TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 12

THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES MORGAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED DECEMBER 6, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 321.

THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES MORGAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Order granting executory process	16	5
Exhibit A	17	5
Exhibit B	20	6
Exhibit C	28	8
Exhibit E	30	9
Two certificates	31, 32	9, 10
Writ of seizure and sale	34	10
Marshal's return thereon	36	11
Document annexed to marshal's return	40	12
Document annexed to marshal's return	42	13
Exhibit D, (see agreement of counsel)	46	15
Copy of advertisement annexed to marshal's return	44	14
Document A, annexed to marshal's return, (see agreement of counsel)	46	15
Supplemental petition	48	15
Order thereon	51	16
Petition of defendants	51	16
Exhibit A	55	17
Submission of petition of defendants	58	18
Rule taken by plaintiff	59	18
Marshal's return thereon	60	19
Grounds	60	19
Objection to motion of June 1, 1869	66	21
Judgment on petition submitted by defendants	71	22
Motion and order reassigning rule of June 1, 1869	72	22
Marshal's return thereon	72	23

	Original.	Print.
Answer to rule of June 1, 1869	73	23
Order rule of June 1, 1869, made absolute	78	24
Motion and order to withdraw bonds and interest coupons	79	25
Petition for writ of error	81	25
Order thereon	82	26
Bond for writ of error	83	26

CHANCERY RECORD IN THE CASE OF THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY *vs.* CHARLES MORGAN, NO. 5817, OF THE DOCKET OFFERED IN EVIDENCE BY DEFENDANTS.

Bill of complaint	85	27
Exhibit A	98	30
Subpœna in chancery	113	35
Marshal's return thereon	114	35
Entry at rules	115	35
Motion	115	36
Affidavit of C. A. Whitney, referred to in the foregoing motion	116	36
Statement or certificate of the clerk referred to in the foregoing motion	118	37
The marshal's return, referred to in the foregoing motion	119	37
Hearing and continuance of rule	121	37
Hearing and continuance of rule	121	38
Motion and order refixing rule	122	38
Marshal's return thereon	122	38
Hearing and submission of rule	123	38
Entry at rules	123	39
Judgment	124	39

Clerk's certificate	125	39
Writ of error	126	40
Citation in error and service	128	40

1 Circuit court of the United States, fifth circuit and district of Louisiana.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company. } No. 5788.

Petition for executory process.—Filed February 23d, 1869.

United States circuit court, district of Louisiana.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company.

To the honorable the circuit court of the United States for the district of Louisiana:

The petition of Charles Morgan, a citizen of the State of New
2 York, residing in the city of New York, in the said State, respectfully represents—

That the New Orleans, Opelousas and Great Western Railroad Company, which has its domicil fixed in the city of New Orleans, in the State of Louisiana, and is a corporation created and existing therein, under the laws of the State of Louisiana, and is in law a citizen of the State of Louisiana, was formed and organized under the act of the legislature of Louisiana entitled "An act for the organization of corporations for works of public utility," approved March 11th, 1852, for the purpose of constructing a railroad from the town of Algiers, on the opposite bank of the Mississippi River from New Orleans, and thence to Berwick's Bay, crossing said bay, and thence to or near Washington, on the Courtableau, in the parish of St. Landry, and afterwards to some point on the Sabine River, with a view to the extension of the said
3 road across the State of Texas to El Paso, on the Rio Grande, and ultimately to the Pacific Ocean; and was afterwards, by the act of the legislature of the State of Louisiana entitled "An act to incorporate the New Orleans, Opelousas and Great Western Railroad Company," approved April 22d, 1853, specially created a body corporate and politic, with full power to sue and be sued, plead and be impleaded, and to do and perform all other acts, and enjoy all the rights and privileges incident to corporations, as will be more fully seen by reference to the said act of incorporation, at page 115 of the acts of 1853.

And your petitioner further represents, that by an act of the legislature of the State of Louisiana entitled "An act to extend the power of railroad companies," approved March 20th, 1856, in addition to the powers before conferred by law upon railroad companies, it was specially provided that any railroad company established under the laws of the State of Louisiana might borrow from time to time such
4 sums of money as might be required for the construction or repair of any railroad, and for that purpose might issue bonds on their obligations, secured by mortgage upon the franchises and all the property of said company, and payable at such times and places as the president and directors might designate, with power to sell, pledge, or otherwise dispose of said bonds on such terms as the said president and directors might deem expedient; and that it was further specially pro-

vided in the said act that a mortgage made by any company as aforesaid should be binding in the several parishes through which a railroad might pass, by the recording of the mortgage in the parish where the principal office or domicil of the company was located, as will more fully appear by reference to the said act at page 205 of the Acts of the Legislature of Louisiana of 1856.

And your petitioner further represents that the said New Orleans, Opelousas and Great Western Railroad Company, on the 17th day of March, 1859, resolved, that for the purpose of obtaining means
5 for the further construction of the road, the president shall be authorized and instructed to issue two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, dated first April, 1859, redeemable on the first of April, 1889, for one thousand dollars each, bearing interest at the rate of eight per cent. per annum, payable semi-annually in coupons attached to the said bonds of eight pounds five shillings sterling, or forty dollars each, the principal of the said bonds made payable at their office in New Orleans, and the interest thereof being made payable in New Orleans, New York, or London, as the president, by his endorsement, might determine, and that the president should be authorized and instructed to secure the payment of the said bonds and the interest thereon, by a first mortgage on the first grand division of the railroad of the company, from Algiers (opposite the city of New Orleans) to Berwick's Bay, together with the land over which the said road is constructed, the equipments, appurten-
6 ances, rights, and franchises of the company applicable to that portion of the road, as will be seen by reference to a duly certified copy of the resolution passed by the board of directors of the said New Orleans, Opelousas and Great Western Railroad Company, on the said 17th day of March, 1859, which is herewith filed, marked Exhibit "A."

And your petitioner further represents that, acting under the authority and instructions granted and given by the said resolutions, William G. Hewes, president of the New Orleans, Opelousas and Great Western Railroad Company, on the 1st day of April, 1859, by public act passed before Selim Magner, a notary public for the city and parish of New Orleans, and in presence of two witnesses, declared that, in pursuance of the resolutions of the board of directors of the said company, passed on the 17th day of March, 1859, as aforesaid, and in virtue of the authority conferred on the said company by the said acts of the legisla-
7 ture of the State of Louisiana, approved on the 22d day of April, 1853, and on the 20th day of March, 1856, he had on that day issued two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, signed by him and by Benjamin F. Flanders, treasurer of the company, redeemable on the 1st day of April, 1889, for the sum of one thousand dollars each, bearing interest at the rate of eight per cent. per annum, payable semi-annually in coupons of forty dollars, or eight pounds five shillings sterling, each, the principal of the said bonds being made payable at the office of the company, and the interest thereof payable in New Orleans, New York, or London, as the said president, by his endorsement, might provide; and all of which said bonds the said notary declared had been severally marked "ne varietur," and countersigned by him for the purpose of more effectually identifying the same with the said act.

And your petitioner further represents that in the said public
8 act the said William G. Hewes, president of the said New Orleans, Opelousas and Great Western Railroad Company, de-

clared that for and in consideration of the premises, and in order to secure the full, faithful, and punctual payment, and the redemption of each and all of the said bonds on that day issued, as aforesaid, to any future holder or holders thereof, and to each and every one of them, when the same should become due and payable, and the payment of the interest accruing thereon in the manner and at the periods of time in the said public act stipulated, as evidenced by the coupons attached to the said bonds, respectively, payable on the first days of April and October of each year, the said New Orleans, Opelousas and Great Western Railroad Company granted in favor of Edmond J. Forstall, or bearer, as well as in favor of all and every person or persons whomsoever who might become the holder or holders of said bonds or
9 coupons, or any of them, a first mortgage lien or privilege upon the whole of the completed grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, then in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road beds of the main tracks and branches, and also all the depots and lands specially appertaining to them, all the buildings, wharves, and all the equipments and franchises belonging and appertaining to the said division of the said road therein mortgaged and referred to; and all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, rights of way, and effects generally of every nature and description whatsoever, in use upon the said division of the said railroad, or in any way attached to or appertaining to the same, without any exception or reservation, as well as all such as
10 should or might thereafter, at any time, be placed upon or attached to said division of the said railroad, whether for the purpose of replacing others removed, or from any other cause whatsoever; and promising not to alienate or encumber, or in any wise affect the same, or any part or portion thereof, to the prejudice of the said mortgage, as will more fully appear by reference to an authentic copy of the said act herewith filed, marked Exhibit "B."

And your petitioner further represents that the said public act of mortgage was duly recorded on the 8th day of April, 1859, in the office of the recorder of mortgages in and for the city and parish of New Orleans, as will be seen by reference to the certificate of the said recorder of mortgages herewith filed, marked Exhibit "C."

And your petitioner further represents that he is the legal holder of eight hundred and forty (840) of the said bonds issued by the said New Orleans, Opelousas, and Great Western Railroad Company, as aforesaid, and marked "ne varietur," and countersigned by the said
11 notary to identify them with the said public act of mortgage aforesaid, given on the property of the said company, as described and set forth in the said public act, and that he is also the legal holder of three thousand six hundred and twenty-five (3,625) coupons of interest, of forty (40) dollars each, now past due and unpaid, attached to the said bonds, and of four thousand two hundred and ninety-six (4,296) coupons of interest detached, of forty (40) dollars each, which belonged to and bear the numbers of other bonds issued by the said New Orleans and Great Western Railroad Company, and marked "ne varietur," and countersigned by the said notary to identify them with the said public act of mortgage, given to secure the payment of the said bonds and coupons of interest as aforesaid, which said bonds and said coupons of interest held by petitioner are hereto annexed for reference, and are made part of this petition, and are set forth,

12 enumerated, and described in the book herewith filed and marked Exhibit "D."

And your petitioner further represents that the said New Orleans, Opelousas and Great Western Railroad Company has altogether neglected and failed to pay the said seven thousand nine hundred and twenty-one coupons of interest, as they respectively fell due; that the same are still due and unpaid, and that the said company is now indebted to your petitioner on the same, in the sum of three hundred and sixteen thousand eight hundred and forty ($316,840) dollars.

And your petitioner further represents that in the sixteenth annual report of the president and directors of the New Orleans, Opelousas and Great Western Railroad Company to the stockholders of the said company, dated on the 25th day of January, 1869, it is declared that there are 15,465 past due interest coupons of forty (40) dollars each, on the first mortgage bonds of the said company, amounting to six
13 hundred and six thousand six hundred ($606,600) dollars, which are now outstanding and unpaid, as will be seen by reference to a copy of an extract of the said report, duly certified under the seal of the said company, which is herewith filed, marked Exhibit "E."

And your petitioner further represents that the said act of mortgage passed before Selim Magner, a notary public as aforesaid, and in the presence of two witnesses as aforesaid, imports a confession of judgment, and that petitioner has a right in the premises to proceed by executory process against the said New Orleans, Opelousas and Great Western Railroad Company, and have the said property subject to the said mortgage, consented, stipulated, granted, and contained in the said public act of mortgage, seized and sold according to law for the whole debt, the payment of which is secured by the said mortgage, and to have the price of the said property subject to the said mortgage, when sold, payable as follows, to wit: The said sum of six hundred and six thou-
14 sand six hundred dollars, ($606,600,) the amount of the said coupons of interest past due, which are now outstanding and unpaid as aforesaid, in cash, and the remainder payable on the 1st day of April, 1889, with interest thereon at the rate of eight (8) per cent per annum thereon, payable, semi-annually, on the 1st day of April and the 1st day of October of each year, the terms of the credit granted by the original contract to the said New Orleans, Opelousas and Great Western Railroad Company in the said bonds and the said public act of mortgage.

And your petitioner further represents that he is informed and believes that the said coupons of interest, in law, bear interest from and after they respectively arrive at maturity and become payable, and that he now expressly reserves his right to claim interest on the same respectively in another suit.

Wherefore your petitioner prays that executory process may be granted him in the premises; that three days' notice may be given to the said New Orleans, Opelousas and Great Western Railroad Com-
15 pany to pay to your petitioner the said sum of three hundred and sixteen thousand, eight hundred and forty ($316,840) dollars, due and unpaid as aforesaid on the 7,921 coupons of interest held by your petitioner; and that in default of the said payment the said mortgaged property hereinbefore described may be seized and sold according to law for the whole debt, the payment of which is secured by the said act of mortgage, the price of the said sale to be payable as follows, to wit: The sum of six hundred and six thousand six hundred ($606,600) dollars, the amount due on interest coupons past due on the first mortgage bonds of the said company outstanding and unpaid as aforesaid, and the costs

of this proceeding payable in cash, and the remainder payable on the 1st day of April, 1889, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the 1st day of April and the 1st day of October of each year, the terms of credit granted by the
16 original contract to the said New Orleansas, Opelousas, and Great Western Railroad Company in the said public act of mortgage and the said bonds identified therewith. And your petitioner further prays for all and general relief.

(Signed) MILES TAYLOR,
Attorney for Petitioner.

Order.—Filed March 30th, 1869.

It is ordered that executory process issue in this case as prayed for in the within petition, and that the said New Orleans, Opelousas and Great Western Railroad Company be notified for three days to pay petitioner the said sum of three hundred and sixteen thousand eight hundred and forty dollars, ($316,840,) and the costs of this proceeding, and that in default of said payment the said mortgaged property described in the petition may be seized and sold according to law for the whole of the debt, the payment of which is secured by the said mortgage described and set forth in said petition, the price of the said sale payable
17 as follows, to wit: the sum of six hundred and six thousand six hundred dollars, ($606,600,) and the costs of this proceeding in cash, and the remainder payable on the 1st day of April, 1889, with interest thereon at the rate of eight per cent. per annum, payable, semi-annually, on the 1st day of April and the 1st day of October of each year.

March 30th, 1869.

(Signed) E. H. DURELL, *Judge.*

Exhibit A referred to in and filed with foregoing petition.

Copy of resolutions of the board of directors of the New Orleans, Opelousas and Great Western Rail Company, passed on the seventeenth day of March, 1859.

1*st. Resolved*, That for the purpose of obtaining means for the further construction of the road, the president be, and he is hereby, authorized and instructed to issue two thousand bonds of the New Orleans, Opelousas, and Great Western Railroad Company, dated first April,
18 1859, redeemable on the first of April, 1889, for one thousand dollars each, bearing interest at the rate of eight per cent. per annum payable semi-annually in coupons attached to said bonds of eight pounds five shillings sterling, or forty dollars each, the principal of said bonds being made payable at their office in New Orleans, and the interest thereof being made payable in New Orleans, New York, or London, as the president by his endorsement may determine.

2*d. Resolved*, That the president be further authorized and instructed to secure the payment of said bonds and the interest thereon by a first mortgage on the first grand division of the railroad of the company from Algiers (opposite the city of New Orleans) to Berwick's Bay, together with the land over which the said road is constructed, the equipments, appurtenances, rights, and franchises of the company, applicable to this portion of the road.

3*d. Resolved*, That such an amount of money as may be necessary to meet each semi-annual interest of the outstanding bonds of the com-

pany shall be provided for pro rata, by monthly deposits in the
19 Louisiana State Bank of this city, and entered as follows: "The New Orleans, Opelousas and Great Western Railroad Company's interest account;" and all funds so deposited shall be considered special, and shall not be used for any other purpose than for the payment by said bank of running interest on the bonds of the company as maturing. And the president is hereby authorized to sign an act of agreement with the president of said bank binding the company as aforesaid.

4. *Resolved*, That in case the Louisiana State Bank should decline to continue to be the agents of said New Orleans, Opelousas and Great Western Railroad Company, or in case the charter of said bank should expire, then the president of this company shall choose any other of the chartered banks in this city for the carrying out of the purposes of these resolutions.

NEW ORLEANS, *November 17th*, 1868.

A true copy from the minutes from the record.

[SEAL.] (Signed) GEO. W. SQUIRES, *Secretary.*

20 *Exhibit B referred to in and filed with the foregoing petition.*

Mortgage New Orleans, Opelousas and Great Western Railroad Company to Edmond J. Forstall.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that this day, before me, Selim Magner, a notary public in and for this city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, personally came and appeared William G. Hewes, esq., of this city, president of the New Orleans, Opelousas and Great Western Railroad Company, a duly incorporated institution of this State, and herein acting in his said capacity, by virtue and in pursuance of the resolutions of the board of directors of said company, passed on the seventeenth day of March, eighteen hundred and fifty-
nine, which resolutions, duly certified copies whereof are hereunto
21 in the margin annexed for reference, are in the words and figures following, to wit:

1*st. Resolved*, That for the purpose of obtaining means for the further construction of the road, the president be, and he is hereby, authorized and instructed to issue two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, dated first April, 1859, redeemable on the first April, 1889, for one thousand dollars each, bearing interest at the rate of eight per cent. per annum, payable semi-annually in coupons attached to said bonds, of eight pounds five shillings sterling, or forty dollars, each, the principal of said bonds being made payable at their office in New Orleans, and the interest thereof being made payable in New Orleans, New York, or London, as the president by his endorsement may determine.

2*d. Resolved*, That the president be further authorised and instructed to secure the payment of said bonds and the interest thereon by a first mortgage on the first grand division of the railroad of the company
from Algiers (opposite the city of New Orleans) to Berwick's Bay,
22 together with the land over which said road is constructed, the equipments, appurtenances, rights, and franchises of the company applicable to this portion of the road.

3*d. Resolved*, That such an amount of money as may be necessary

to meet each semi-annual interest of the outstanding bonds of the company shall be provided for pro rata, by monthly deposits in the Louisiana State Bank of this city, and entered as follows: "The New Orleans, Opelousas and Great Western Railroad Company's interest account;" and all funds so deposited shall be considered special, and shall not be used for any other purpose than for the payment of said bank of running interest on the bonds of the company as maturing. And the president is hereby authorized to sign an act of agreement with the president of said bank, binding the company as aforesaid.

4th. Resolved, That in case the Louisiana State Bank should decline to continue to be the agents of said New Orleans, Opelousas and Great Western Railroad Company, or in case the charter of said bank
23 should expire, then the president of this company shall choose any other of the chartered banks of this city for the carrying out of the purposes of these resolutions.

Which said appearer declared that, in pursuance of the above-recited resolutions, and also by virtue of the authority conferred upon said company by, first, the ninth section of an act of the legislature of the said State of Louisiana, entitled "An act to incorporate the New Orleans, Opelousas and Great Western Railroad Company," duly approved on the twenty-second day of April, 1853, (No. 149;) and, second, by another act of the same legislature, duly approved on the twentieth day of March, 1856, entitled "An act to extend the powers of railroad companies," (No. 194,) he has, in his capacity aforesaid, this day issued two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, signed by him and by Benjamin F. Flanders, treasurer of said company, redeemable on the first day of April,
24 eighteen hundred and eighty-nine, for the sum of one thousand dollars ($1,000) each, bearing interest at the rate of eight per cent. per annum, payable semi-annually in coupons of forty dollars, or eight pounds five shillings sterling, each, the principal of said bonds being made payable at the office of the company in the city of New Orleans, and the interest coupons in New Orleans, New York, or London, as he the said president, may by his endorsement provide. And all which bonds have been severally marked "ne varietur," and countersigned by me, the said notary, for the purpose of more effectually identifying the same herewith.

Now, therefore, in consideration of the premises, and in order to secure the full, faithful, and punctual payment, and the redemption of each and all the said bonds (this day issued as aforesaid) to any future holder or holders thereof, and to each and every one of them, when the same shall become due and payable, together with the interest accruing thereon, in the manner and at the periods of time hereinabove stipulated, as evidenced by the coupons attached to the said bonds
25 respectively, payable on the first days of April and October of each year, the said New Orleans, Opelousas and Great Western Railroad Company do, by these presents, by their president, (the said William G. Hewes,) grant, in favor of Edmond J. Forstall, or bearer, as well as in favor of all and every person or persons whomsoever, who may become the holder or holders of said bonds or coupons or any of them, a first mortgage lien or privilege upon the whole of the completed grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, now in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road beds of the main track and branches,

and also all the depots and lands specially appertaining to them, all the buildings, wharves, and all the equipments and franchises belonging and appertaining to this division of the road herein mortgaged and referred to, and also all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, right of way, and effects generally of every nature and description whatsoever in use upon the said division of the said railroad, or in any wise attached or appertaining to the same, without any exception or reservation, as well as all such as shall or may hereafter, at any time, be placed upon or attached to said division of the said railroad, whether for the purpose of replacing others removed therefrom or from any other cause whatsoever; the said company promising, by their said president, not to alienate nor encumber, nor in any wise affect the same or any part or portion thereof to the prejudice of these presents.

By reference to the annexed certificates of the recorders of mortgages in and for the parish of Orleans, Jefferson, St. Charles, Lafourche Interior, Assumption, Terrebonne, and St. Mary, respectively traversed by the said division of the said railroad herein mortgaged, it will appear that there exists no mortgage or encumbrance whatsoever inscribed against the said division of the said railroad, franchises, and appurtenances, nor upon any of the lands or property connected therewith, owned by the said company.

And now personally came and appeared the said Edmond J. Forstall, who, after having read the foregoing act of mortgage, declared that he does, by these presents, accept the same as well for himself as for all and every other person or persons who may hereafter become the purchaser or purchasers, assignee or assignees, holder or holders, of the said bonds or coupons, or any number thereof, or any of them, together with all the rights, privileges, and benefits thereto belonging or in any wise appertaining.

Thus done and passed in my office at the said city of New Orleans, in the presence of Edward G. Gottschalk and Forester Brugier, witnesses of lawful age, domiciliated in this city, who hereunto subscribed their names, together with the said parties and me, the said notary, on this first day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

(Signed) WILLIAM G. HEWES, *President.*
EDM. J. FORSTALL.
E. G. GOTTSCHALK.
F. BRUGIER.
S. MAGNER, *Not. Pub.*

A true copy. New Orleans, 9th November, 1868.
[SEAL.] (Signed) S. MAGNER, *Not. Pub.*

[5-c. int. rev. stamp affixed and cancelled.]

Exhibit C referred to in and filed with the foregoing petition.

By act, before S. Magner, notary public, dated 1st April, 1859, William G. Hewes, president of the New Orleans, Opelousas and Great Western Railroad Company, granted in favor of Edmund J. Forstall a first mortgage lien and privilege upon the whole of the contemplated grand division of the railroad between Algiers, opposite the city of New Orleans, and Berwick's Bay, now in full operation, together with the road beds, branches, depots, lands, buildings, wharves, cars, engines, wagons, ma-

chinery, right of way, &c., &c., to secure the payment of two
29 thousand bonds of said railroad company dated 1st April, 1859, signed by said Hewes, as president, and Benjamin F. Flanders, treasurer of said company, redeemable on the 1st April, 1889, for $1,000 each, with interest at 8 % per annum, payable semi-annually in coupons of $40 or £8 5 shillings each, which coupons are attached to said bonds, and payable on 1st days of April and October of each year. All which bonds were paraphed by said notary.

New Orleans, April 8th, 1859.

(Signed) JOHN HOLMES, *Recorder.*

Mortgage, $2,000,000, with int., &c., &c.

I, the undersigned, deputy recorder of mortgages for this city and parish of Orleans, do hereby certify the above to be a true and correct copy of the record of the act of mortgage recorded in B. 73, fo. 85 of this office.

New Orleans, November 18th, 1868.

[SEAL.] (Signed) A. DUCATEL, JR., *D'y R'r.*

30 *Exhibit E referred to in and filed with the foregoing petition.*

Extract from the sixteenth annual report of the president and directors to the stockholders of the New Orleans, Opelousas and Great Western Railroad Company, dated 25th January, 1869.

The total indebtedness of the company at this time is as follows:

1,987 first mortgage bonds, of one thousand dollars each, on 80 miles of contemplated road	1,987,000 00
34 second mortgage bonds, of one thousand dollars each, issued in settlement of 850 past due coupons of first mortgage bonds, $40	34,000 00
Bills payable, with interest on same to 1st January, 1869, issued for 1,145 first mortgage coupons, of $40 each	40,966 24
Outstanding unpaid coupons of first mortgage bonds, 15,165 of $40	606,600 00
Outstanding coupons unpaid of second mortgage bonds, including those of January 1st, 1869, 102 of $40	4,080 00
Balance claimed by U. S. government on 1st January, 1869	34,011 59
	2,706,657 83
Of this sum there is now due in cash on 1st mortgage bonds	606,600 00
31 On bills payable, with interest, on same 1st January, 1869, issued for 1st mortgage coupons	$20,966 24
On outstanding coupons of 2d mortgage bonds	4,080 00
Balance claimed by the U. S. 1st January, 1869	34,011 59
Total	$685,657 83

A true copy:

[SEAL.] (Signed) A. B. SEGER, *President.*

Certificate of discontinuance and of payment of costs.—Filed February 23d, 1869.

Received, New Orleans, February 23d, 1869, from Miles Taylor, attorney for Charles Morgan, the sum of two hundred and ten dollars, amount

costs in full in the suit of Chas. Morgan vs. the New Orleans, Opelousas and Great Western Railroad Co., No. 180 of the docket of the 6th district court for the parish of Orleans.

[SEAL.] (Signed) WM. WOELPER, *Clerk.*

32 *Certificate of the clerk.—Filed February 23d, 1869.*

U. S. circuit court, district of Louisiana.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company. } No. 5788.

Miles Taylor, the attorney of Charles Morgan, the plaintiff in the above-entitled case, has this day filed or deposited with the clerk of the court, as annexed to and made part of the petition in the said case, the following:

1st. A copy of the resolutions of the board of directors of the New Orleans, Opelousas and Great Western Railroad Company, passed on the 17th of March, 1859, marked Exhibit "A."

2d. An authentic copy of the act of mortgage passed before Selim Magner, notary public, on the 1st of April, 1859, by the New Orleans, Opelousas and Great Western Railroad Company to Edmond J.
33 Forstall and others, to secure the payment of bonds and interest coupons issued by the company, marked Exhibit "B."

3d. A certificate of the recorder of mortages of the city and parish of Orleans, dated November 18th, 1868, showing the recording of the said mortgage act in the mortgage office of the city and parish of New Orleans on the 8th of April, 1859, which is marked Exhibit "C."

4th. Eight hundred and forty bonds of $1,000 each, issued by the New Orleans, Opelousas and Great Western Railroad Company on the 1st of April, 1859, and 3,625 coupons of interest of $40 each attached to the said bonds, and 4,238 coupons of interest of $40 each detached, which belonged to and bear the numbers of bonds issued by the New Orleans, Opelousas and Great Western Railroad Company, and which bonds, and coupons of interest attached and detached, are set forth, enumerated, and described in a certain book marked Exhibit "D."

5th. The book marked Exhibit "D."

6th. A certified copy of an extract of or from the sixteenth
34 annual report of the president and directors of the New Orleans, Opelousas and Great Western Railroad Company to the stockholders of the company, dated 25th of January, 1869, and marked Exhibit "E."

February 23d, 1869.

(Signed) D. URBAN, *Clerk.*

Writ of seizure and sale.—Issued March 30th, 1869, returned and filed November 20th, 1869.

United States of America, circuit court of the United States, fifth judicial circuit and district of Louisiana.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company. } No. 5788.

The President of the United States to the marshal of the United States for the district of Louisiana, greeting:

You are hereby commanded to make legal demand from the New Orleans, Opelousas and Great Western Railroad Company of the
35 payment of the sum of three hundred and sixteen thousand eight hundred and forty dollars, ($316,840,) and the costs of this proceeding, cash, and that in default of said payment to seize and sell according to law (for the whole of the debt, the payment of which is secured by the mortgage described and set forth in the plaintiff's petition) the property belonging to the said company, and described as follows: The whole of the contemplated grand division between Algiers (opposite the city of New Orleans) and Berwick's Bay, in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road-beds of the main track and branches, and also all the depots and lands specially appertaining to them, all the buildings, wharves, and all the equipments and franchises belonging to and appertaining to the said division of the said road, and all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, rights of way, and effects generally of every nature and description whatsoever in use upon the
36 said division of the said railroad or in any way attached to or appertaining to the same, without any exception or reservation.

The price of the said sale payable as follows, to wit: The sum of six hundred and six thousand six hundred dollars, ($606,600,) and the costs of this proceeding, in cash, and the remainder payable on the 1st day of April, 1889, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the 1st day of April and the 1st day of October of each year.

And what you do in the premises you make due return thereof, together with this writ, to our said court according to law.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at New Orleans, this 30th day of March, 1869.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *Dy Clk.*

Marshal's return on the foregoing writ.

U. S. circuit court.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND
37 Great Western Railroad Co. } No. 5788.

Writ of seizure and sale received March 31st, 1869, by the U. S. marshal, and on the 31st day of March, 1869, served on the New Orleans, Opelousas and Great Western Railroad Company, by delivering to A. B. Seger, president of said company, at the office of said company, No. 69 Canal street, a notice to pay into my hands, within three days from the service of said notice, the sum of $316,840, due to the plaintiff, and the costs, and that in default of such payment I should seize and sell the property described in the petition filed and order made in the said cause, which accompanied the said notice and was served therewith, to satisfy the mortgage debt agreeably to the said order and according to law.

And on the 5th day of April, 1869, more than three days having elapsed after the service of the said notice and the said petition, and the said order made on the same, and default having been made
38 in the payment of the said sum or any part thereof, I proceeded to seize and take into my possession the property described in the document hereto annexed, marked "A," and made part hereof. And after the expiration of the legal delay from the date of the service of notice of said seizure on the said New Orleans, Opelousas and Great Western Railroad Co., I advertised the said property for sale by advertisements, announcing the sale to take place at the entrance to the custom-house on Old Levee street, between Canal and Custom-house streets, in this city, on the 25th of May, 1869, at twelve o'clock m. Said advertisements were inserted and published in three newspapers in the city of New Orleans, to wit, in the New Orleans Republican, Commercial Bulletin, and New Orleans Picayune, from the 16th day of April, 1869, to the day of sale, being full thirty days from the date of the first notice given in said newspapers. Said advertisements were inserted and published in said newspapers on the 16th, 20th, 24th, & 29th April, 1869, and on the 4th, 11th, 18th, & 25th of May, 1869.

And after having further complied with and performed all the
39 additional previous legal requisites, and after the said property duly appraised, I did expose the same at public sale at auction, according to law, at the said entrance to the custom-house on Old Levee street, between Canal and Custom-house streets, in this city, on the said 25th day of May, 1869, at twelve o'clock m., when, after making due proclamation of said sale, and duly crying the said property and appurtenances, the same were adjudicated unto Charles Morgan, of the city of New York, he being the last and highest bidder thereon, for the price and sum of ($2,050,000) two millions and fifty thousand dollars, of which said sum, according to the published conditions of said sale, ($686,000) six hundred and eighty six thousand dollars and the costs of suit, to wit, $15,825, were paid to me in cash in United States treasury notes, and the remainder of the purchase price, to wit, ($1,348,175) one million three hundred and forty-eight thousand one hundred and seventy-five dollars, the said purchaser, Charles Morgan, assumes
40 the payment of on the 1st day of April, 1889, with interest thereon at the rate of 8 % per annum, payable semi-annually, on the 1st day of April, and 1st day of October of each year, until the final payment and extinction of the whole on the 1st day of April, 1889. And the said property and appurtenances described in the advertisement hereto annexed, and more fully in the document marked "A," also hereto annexed as part hereof, remains specially mortgaged for the final payment of the said balance of purchase price, with the interest as aforesaid due and accruing thereon.

New Orleans, November 20th, 1869.

(Signed) F. J. HERRON,
Late U. S. Marshal,
Per J. R. WEST,
Late D'y U. S. Marshal.

Document annexed to the foregoing return.

U. S. circuit court.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co. } No. 5788.

41 To the New Orleans, Opelousas and Great Western Railroad Co.:

By virtue of a writ of seizure and sale issued and to me directed by the hon. circuit court of the United States for the fifth circuit and district of Louisiana in the above entitled suit, I hereby notify you to pay into my hands within three days from the service of this notice three hundred and sixteen thousand eight hundred and forty dollars due to plaintiff, and the costs; and that in default of such payment, I shall seize and sell the property described in the accompanying petition and order served herewith to satisfy the mortgage debt, agreeably to said order and according to law.

(Signed) JOHN FAHY,
D'y Marshal.

U. S. MARSHAL'S OFFICE, *New Orleans, March* 31st, 1869.

Return on above notice.

Notice of demand served March 31st, 1869; and on the same day
42 served a copy of the within notice, and copy of the petition and order in the said case accompanying the same, on the New Orleans, Opelousas and Great Western Railroad Company, by delivering them to A. B. Seger, president of said company, at their domicil, No. 69 Canal street, in the city of New Orleans.

(Signed) JOHN FAHY,
D'y Marshal.

U. S. MARSHAL'S OFFICE, 31*st March*, 1869.

Document annexed to the foregoing return on writ of seizure and sale.

United States marshal's office, district of Louisiana, U. S. circuit court.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO. } No. 5788.

To the New Orleans, Opelousas and Great Western Railroad Co.:

Take notice that I have seized, and, after the legal delay, shall proceed to advertise and sell, according to law, "the whole of the
43 completed grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, now in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road beds of the main track, and branches, and also all the depots and lands specially appertaining to them; all the buildings, wharves, and all the equipments and franchises belonging and appertaining to this division of the road; and also all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, rights of way, and effects generally of every nature and description whatsoever in use upon the said division of the said railroad, or in any wise attached or apertaining to the same, without any exception or reservation," to pay and satisfy the writ issued in this case (with interest and costs) unless the same is immediately paid.

(Signed) JOHN FAHY,
Deputy Marshal.

44 Notice of seizure issued April 5th, 1869; and on the same day served a copy hereof on the New Orleans, Opelousas and Great Western Railroad Co., by delivering it to A. B. Seger, the president of said company, at their domicil, No. 69 Canal street, in this city.

New Orleans, April 5th, 1869.

(Signed) JOHN FAHY,
D'y Marshal.

Copy of advertisement annexed to the foregoing return on writ of seizure and sale.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Co.

Circuit court of the United States, fifth circuit and district of Louisiana, No. 5788.

By virtue of a writ of seizure and sale to me directed by the honorable the circuit court of the United States for the fifth circuit and district of Louisiana in the above entitled suit, I will proceed to sell at public auction, at the entrance to the custom-house on Old Levee street, between Canal and Custom-house streets, in the second district
45 of this city, on Tuesday, May 25th, 1869, at 12 o'clock m., the following described property, viz:

The whole of the completed grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, now in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road beds of the main tracks and branches, and also all the depots and lands specially appertaining to them, all the buildings, wharves, and all the equipments and franchises belonging and appertaining to this division of the road, and also all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, rights of way, and effects generally, of every nature and description whatever, in use upon the said division of the said railroad, or in any wise attached to or appertaining to the same, without any exception or reservation, as per inventory on file in this office, seized in the above suit.

46 Terms of sale: The sum of six hundred and eighty-six thousand six hundred dollars, ($686,600,) and costs, payable in cash at the time of adjudication in United States treasury notes, and the remainder of the purchase price payable on the first day of April, 1889, with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of April and the first day of October of each year.

Cost of deed, internal revenue stamps, recording, etc., at the expense of the purchaser.

United States marshal's office, New Orleans, April 15th, 1869.

P. J. HERRON,
U. S. Marshal District of Louisiana.

Ap. 17, 20, 24, 29; M'y 4, 11, 18, 25.]

Agreement.—Filed November 25th, 1869.

U. S. circuit court.

CHARLES MORGAN
vs.
47 THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO. } No. 5788.

It is hereby agreed by and between the counsel for plaintiff and defendants in the above-entitled cause that the transcribing of Exhibit "D," filed with and referred to in plaintiff's petition, is dispensed with, the original to be used instead; that the transcribing of document marked "A," annexed to and filed with the marshal's return on the writ of seizure and sale, is dispensed with, and that such dispensation shall not effect the completeness of the transcript of record, nor the clerk's certificate thereto.

New Orleans, November 25th, 1869.

(Signed) M. M. COHEN & SON,
For Defendants.

(Signed) MILES TAYLOR,
Attorney for Charles Morgan.

48 *Supplemental petition and order thereon.—Filed April 20th, 1869.*

U. S. circuit court, district of Louisiana.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY. } No. 5788.

To the honorable the circuit court of the United States for the district of Louisiana:

The supplemental petition of Charles Morgan, plaintiff in the above-entitled case, leave of the court being first had and obtained for filing the same, respectfully represents—

That since the order for executory process, to issue in the said case against the said New Orleans, Opelousas and Great Western Railroad Company, to have the said property, subject to the said mortgage consented, stipulated, and contained in the said public act of mortgage, seized and sold according to law for the payment of the whole
49 debt secured by the said mortgage, and to have the price of the said sale payable as follows, to wit, the sum of $606,600, the amount of the said coupons of interest past due and unpaid, as set forth in said petition, for cash; the interest coupons on the said two thousand bonds issued by the said New Orleans, Opelousas and Great Western Railroad Company on the said 1st day of April, 1859, and identified as aforesaid with the said act of mortgage, which were to fall due and become payable on the 1st day of April, 1869, have become due and payable and have not been paid, amounting to the sum of eighty thousand dollars, ($80,000,) of interest on the said first mortgage bonds, the payment of which was and is now secured by the said mortgage in addition to the said sum of $606,600 before due and unpaid on the said bonds as aforesaid; and that in the premises the sum of six hundred and eighty-six thousand six hundred dollars ($686,600) of the said

mortgage debt is now past due and unpaid, and that the price of
50 the sale of the said mortgaged property under the said executory process ought to be made payable, six hundred and eighty-six thousand six hundred dollars, ($686,600,) the amount of the said coupons of interest past due and unpaid as aforesaid in cash, and the remainder only payable on the 1st day of April, 1889, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the 1st day of April and the 1st day of October of each year, on the credit granted by the original contract, as provided for in the said order for executory process.

Wherefore your petitioner prays that the portion of the price of the said sale to be paid in cash at the time of the said sale hereafter to be made according to law under the said order for executory process made herein, shall be the sum of six hundred and eighty-six thousand six hundred dollars, ($686,600,) the amount of the coupons of interest on the said bonds now past due and which are unpaid as aforesaid,
51 and the remainder only payable on the 1st day of April, 1889, with interest thereon as provided for in the order for executory process heretofore granted herein.

(Signed) MILES TAYLOR,
Attorney for Petitioner.

Order.

Let this supplemental petition be filed, and the prayer thereof granted.

April 20th, 1869.

(Signed) E. H. DURELL, *Judge.*

Petition.—Filed June 1st, 1869.

United States of America, circuit court of the United States, district of Louisiana.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTern Railroad Co. } No. 5788.

To the honorable the judges of the circuit court of the United States for the district aforesaid:

The petition of the said New Orleans, Opelousas and Great
52 Western Railroad Company, the defendant named in the proceedings in the cause described in the said title, respectfully shows—

That the said Charles Morgan obtained from the Honorable E. H. Durell, on his petition, an order for executory process upon the statements and the exhibition of evidence filed with the same, as will appear from the petition, order, and evidence remaining of file in the said court.

2. That executory process did issue from the office of the clerk of said court, and was placed in the hands of the marshal of the said court for execution, as will appear upon the papers of record in said court.

3. That notice of the said process was given to the corporation, (defendant,) and that the said defendant applied to the circuit court to enjoin and restrain the execution of the process, and before the same was executed; but the court, after advising upon the motion for the injunction on the 24th day of May, 1869, refused the motion, and on the
53 following day the property set forth in the marshal's return of seizure was sold under the order and writ of seizure issued there-

on, and your petitioners, the said corporation, are dispossessed and disseised of the entire property by an adjudication of the same to the said Morgan who was the purchaser at the said sale.

4th. The said defendant further shows that since the 25th day of May, 1869, the said marshal has advertised in reference to the adjudication aforesaid, and is proceeding to distribute the price arising from the said sale made by him under the conditions aforesaid, as will appear by his advertisement filed herewith as a part of this petition and marked Exhibit "A."

5. Your petitioners show that the original order of seizure made upon the petition of Charles Morgon, by the judge; the issue of the process and the seizure thereon; the refusal of the court to allow of an injunction as to restrain the process in any manner; the sale of the property by the marshal at the time and place upon the advertisements and appraisements aforesaid; and his adjudication of the property to
54 Charles Morgan; and the proceedings to adjudicate upon the distribution of the money arising from the sale, are irregular, illegal, and tend to the wrong and damage of your petitioner.

6th. Your petitioner avers that the order could not have been legally made without notice to the said defendant by proper process. That Charles Morgan did not show such a right as a creditor as to warrant the issue; nor is the order supported by authentic evidence; nor are proper parties made thereto; nor can final process issue from the court before trial and that all parties in interest in the mortgage should have been made to the same, and that the subject of the suit was only cognizable in chancery, and the execution and sale ought not to have been proceeded with until after the objections set forth in the injunction had been decided, whereas it appears that the advertisements were made pending that motion, and the sale took place the day following.

Your petitioner prays that your honors would consider of this
55 petition and of the record in the said cause, No. 5788, between the said parties and the evidence and notices therein, and also the application for injunction and the bill filed, and that the same may be held and taken as a part of this petition, and that your honors would award a writ to the said Charles Morgan, expressing a willingness to hear this complaint, and in order that the validity of the said order for process, the process thereon, the proceedings of said marshal, may be examined and their legality ascertained, and that all proceedings under the same may be suspended and restrained, by writ, until the final order be made herein, and upon the matter of this petition; and your petitioners will ever pray, &c., &c.

The petitioners submit to the court the records in this court in the cases aforesaid, No. 5788.

(Signed) M. M. COHEN.

CAMPBELL, SPOFFORD & CAMPBELL, *for Petitioner.*

Advertisement marked Exhibit "A" and referred to in the foregoing petition.

56 U. S. marshal's sales.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO.

United States circuit court, district of Louisiana, No. 5788.

The property of the New Orleans, Opelousas and Great Western

Railroad Company, embraced in and subject to the mortgage granted by the said company, by public act passed before Selim Magner, a notary public in the city of New Orleans, on the 1st day of April, 1859, to secure the payment of $2,000,000, with 8 per cent. interest per annum thereon, payable semi-annually on the 1st day of April and the 1st day of October in each year, having been sold at public sale on the 25th inst., under process in my hands issued out of the circuit court of the United States for the district of Louisiana in the above-entitled case, to satisfy the entire debt due by the said company under the said
57 mortgage, and which debt is represented by 2,000 bonds for $1,000 each, issued by the said company, and identified with the said mortgage by the paraphe of the said notary, and by the coupons of interest belonging to the said bonds respectively, and it being the duty of the United States marshal to make a distribution of the price of the said property among the parties holding the said bonds and coupons in proportion to their respective rights under the said mortgage.

Notice is therefore hereby given to all the holders of the said bonds of the said New Orleans, Opelousas and Great Western Railroad Company, issued by the said company and identified with the said mortgage and of the coupons of interest belonging to them respectively, to produce the same to the said marshal on or before the 9th day of June, 1869, in order that he may be informed of the amount of the same, and may be enabled to make a distribution of the proceeds of the said sale pro rata between the holders of the same in proportion to their respective
58 interests in the said mortgage debt.

F. J. HERRON,
Late U. S. Marshal, 79 Custom-house Street.

May 26th, otf.]

Submission of petition.—Extract from the minutes.

United States circuit court for the fifth circuit and district of Louisiana.—April term, 1869.

NEW ORLEANS, *Tuesday, June 1st*, 1869.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO. } No. 5788.

The counsel for the defendant this day moved the court to grant the prayer of the petition now presented. Whereupon the court took time to consider.

59 *Rule.—Extract from the minutes of Tuesday, June 1st*, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO. } 5788

On motion of Miles Taylor, attorney for Charles Morgan, the plaintiff, it is ordered that the New Orleans, Opelousas and Great Western Rail-

road Company show cause on Tuesday, the 8th inst., at 11 a. m., why said company shall not forthwith furnish to F. J. Herron, late U. S. marshal, and now acting in the capacity of marshal in said case, a statement of the number of bonds issued by said company and now outstanding, and a statement of the number of coupons belonging to the said bonds which have been paid or extinguished by the said company, and shewing the number of the said bonds to which they belonged, and the numbers on the said coupons respectively, shewing the dates
60 at which they respectively matured, certified under the seal of the said company, and verified by the oaths of the president and secretary of the said company on the grounds filed.

Marshal's return.

Received, June 2d, 1869, by the U. S. marshal, and on same day of June, 1869, served copy of within rule on New Orleans, Opelousas and Great Western Railroad Co. named herein, by leaving same in hands of A. B. Seger, president of said company, at office, 69 Canal street, in this city.

New Orleans, June 3d, 1869.

(Signed) S. W. REED,
D'y U. S. Marshal.

Rule and grounds.—Filed June 1st, 1869.

U. S. circuit court, district of Louisiana.

61 CHARLES MORGAN *vs.* THE NEW ORLEANS, OPELOUSAS AND Great Western Railroad Co. } No. 5788.

On motion of Miles Taylor, of counsel for Charles Morgan, the plaintiff in the above-entitled case, and on giving the court to understand and be informed—

That a sale was made on the 25th day of May, 1869, of the whole of the contemplated grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, constructed by the said New Orleans, Opelousas and Great Western Railroad Company, in pursuance of their charter, together with the railroad beds of the main tracks and branches, and also all the depots and lands specially appertaining to them, all the buildings, wharves, and all the equipments and franchises belonging and appertaining to the said division of the said road, and all and singular the cars, locomotives, engines, wagons, machinery, fixtures, utensils, implements, rights of way, and effects
62 generally of every nature and description whatsoever in use upon the said division of said railroal, &c., &c., &c., under process issued out of this honorable court in the said case, to satisfy the whole of the debt then due and owing by the said New Orleans, Opelousas and Great Western Railroad Company, the payment of which was secured by a certain mortgage granted by the said company by public act passed before Selim Magner, a notary public in the parish of Orleans, on the 1st day of April, 1859, on the said property sold as aforesaid on the said 25th day of May, 1869, which said debt, as described in the said act of mortgage, amounted to the sum of two millions of dollars, ($2,000,000 00,) bearing interest at the rate of

eight per cent. per annum, payable semi-annually on the 1st day of October, 1859, and on the 1st day of April and the 1st day of October, 1860, and in each and every year thereafter until the 1st day of April, 1889, when the principal of the said debt became due, and which
63 said debt was represented by 2,000 bonds, issued by the said company for $1,000 each, and by 60 coupons of interest attached to & belonging to each bond for the sum of $40 each, and numbered from 1 to 60, and falling due respectively in the order in which they were numbered on the 1st day of October and of April, in each of the years from the date of the said mortgage act, and up to the 1st day of April, 1889.

And on further giving the court to understand and be informed, that from and after, about the year 1861, the said company failed to pay the said coupons of interest, with any regularity, and that a very large number of the coupons representing the interest of the said debt, and the payment of which is secured by the stipulations contained in the said act of mortgage in the same manner as the principal of the debt, and which fell due in the years 1862, 1863, 1864, 1865, 1866, 1867, 1868, and 1869, are still due and unpaid by the said company.

And on further giving the court to understand and be informed
64 that to enable the officer into whose hands the price of the said sale is placed, to be distributed among the holders of the said bonds and the coupons of interest pro rata, (the proceeds of the said sale not being sufficient to pay the said mortgage debt in full,) it is necessary for the said officer to ascertain the number of the said bonds issued as aforesaid by the said company, which are now outstanding; and also to ascertain what coupons of interest, which are now past due, have been paid by the said company in order to enable him to know the existing amount of the said mortgage debt, and to put him in condition to prepare a tableaux showing the disposition and distribution to be made of the proceeds of the said sale among the holders of the said bonds and interest coupons, to be laid before the court to aid it in making a proper distribution of the same.

And on further giving the court to understand and be informed
65 that the said company has a record shewing the number of the said bonds issued and now outstanding, and a record also of the coupons of interest belonging to the said bonds, which have been paid by the said company and are now extinguished and ought to be cancelled.

And on further giving the court to understand and be informed that F. J. Herron, late marshal of the United States for the district of Louisiana, and now acting in the capacity of marshal in the said case, has applied to the said company for a statement by the proper officer of the said company of the number of the said bonds issued by the said company and now outstanding, and for a statement also of the coupons of interest belonging to the said bonds which have been paid by the said company, and that the said company has refused to furnish him the said acting marshal in his official capacity.

It is ordered that the said New Orleans, Opelousas and Great
66 Western Railroad Company show cause on Tuesday, the 8th day of June, 1869, at 11 o'clock a. m., why the said company shall not forthwith furnish to the said F. J. Herron, in his said capacity, a statement of the number of the said bonds issued by the said company and now outstanding, and a statement of the number of coupons belonging to the said bonds, which have been paid or extinguished by the said company, and showing the number of the said bonds to which they belonged, and the numbers on the said coupons respectively, showing

the dates at which they respectively matured, certified under the seal of the said company, and verified by the oaths of the president and secretary of the said company.

Objections to motion made on 1st June, 1869.—Filed June 8th, 1869.

U. S. circuit court, district of Louisiana.

67 CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY. } No. 5788.

And into court by the undersigned, his counsel, comes Charles Morgan, and in opposition to the motion to grant the prayer of the petition, presented to the court on or about the 1st day of June, 1869, and of which notice was received by the said Charles Morgan, through his counsel, on the 7th day of June, 1869, says:

First. That the allegations made by the defendants in their said petition, (a copy of which signed by M. M. Cohen, and Campbell, Spofford & Campbell, for the said defendants, was left at the office of the undersigned counsel of the said Charles Morgan, and is now in his possession,) under Nos. 1, 2, 3, 4, 5, 6, as to the validity of the order for process in the said above-entitled case, and of the process itself, and of the proceedings under the same up to the sale and adjudication of the property seized under the said process, are in substance the same with
68 those made by the said defendants in their bill filed on the chancery side of the court in the case entitled "The New Orleans, Opelousas and Great Western Railroad Company vs. Charles Morgan," number 5817 of the docket of the court, wherein they prayed for an injunction to enjoin & restrain the said Charles Morgan from proceeding with the process granted in the above-entitled case; that after a hearing of all the said matters and things, upon the motion for an injunction to issue upon the allegations contained in the said bill filed as aforesaid, the said injunction was referred to, and that, in point of fact, so far as the exact authority given allegations touching the validity of the order he has assumed to control.

3. That your respondents, being informed, by a notice from the marshal, of his purpose to seize and sell the said property, did apply
75 to the circuit court for an injunction upon a bill filed by your respondents in the said circuit court, wherein your respondents set forth at large their opposition to the order, the proceedings under it, the jurisdiction over the same, and to the prosecution of it, and clerk; and

Second. That as to the remaining matter set forth in the said petition, to wit, that the marshal has published a notice calling on the holders of the bonds and coupons of interest belonging to the same, issued by the said defendants, to produce the same to him in order that he may be informed of the amounts of the same, and may be enabled to make a distribution of the proceeds of the sale of the said property pro rata between the holders of the same, he further says there is no foundation in law for the application made by the defendants in the said petition to have the proceedings of the said marshal suspended in the premises, inasmuch as the said marshal is now engaged, under the authority of law, in ascertaining the amounts now due on the said mortgage debt, and who are the holders of the same, in order that he may be enabled to present to the court a tableau of distribution shewing the

70 amount of the proceeds of the sale of the said property which is to be allotted or apportioned to each bond and interest coupon issued by the said defendants, which are now outstanding and due, and after legal proceedings had thereon, to obtain the authority of the court to pay the amounts due on the same respectively to the holders of the said bonds and coupons, in execution of the process of the court now in his hands. And the said Charles Morgan says further in opposition to the said motion, that the said defendants have no right to interfere with the execution of the process of the court in the above-entitled case in the way and manner proposed, and that the intent and design of the said defendants in the said petition is to prevent the said marshal from getting the information necessary to enable him to discharge his duty and to present a tableau of distribution to the court for its final order thereon, as will more fully appear from the refusal, which he is
71 ready to prove, of the said New Orleans, Opelousas and Great Western Railroad Company, to furnish the said marshal with a statement of the said bonds now outstanding, and of the interest coupons belonging to the said bonds respectively, which have been paid by said company.

(Signed) MILES TAYLOR, *Solicitor.*

Judgment on petition submitted by defendants.—Extract from judgment docket.

United States circuit court, fifth circuit & district of Louisiana.—April term, 1869.

NEW ORLEANS, *Monday, June 14th*, 1869.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, dist. judge.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co. } No. 5788.

[illegible] by the said company and are now extinguished and ought to be cancelled.

And on further giving the court to understand and be informed that F. J. Herron, late marshal of the United States for the district of Louisiana, and now acting in the capacity of marshal in the said case, has applied to the said company for a statement by the proper officer of the [illegible]

(Signed) E. H. DURELL, *Judge.*

Motion and order, rule of June 1st, 1869, reassigned.—Extract from the minutes of Tuesday, June 15th, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

On motion of Miles Taylor, attorney for the plaintiff, ordered that the rule of 1st instant be renewed and assigned for Friday, 18th inst., at 11 a. m., and that the defendant be notified hereof.

Marshal's return.

Received, June 16th, 1869, by the U. S. marshal and served copies of the within as follows: June 16th, 1869, one on J. M. Spofford, 27 Commercial place; other June 16th, 1869, on M. M. Cohen, personally, at 30 Camp street, New Orleans.

(Signed) S. W. REED,
Dy U. S. Marshal.

Answer to rule of 1st June, 1869.—Filed June 18th, 1869.

Circuit court of the United States, district of Louisiana.—April term 1869.

CHARLES MORGAN
vs.
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Co.

This respondent, being served with the rule of the plaintiff of the 1st June, instant, protests against any order or judgment in the said suit, or any order recognising that there was a valid sale of the property described in the motion, and against the jurisdiction of this court in this behalf, for the following reasons:

1st. That it doth manifestly appear that one of the judges of the court aforesaid did make, upon the petition of Charles Morgan, the plaintiff, an order for the seizure and sale of the property of your petitioner, without any citation being made, or other process from this court being issued, to show any cause or opposition to the order, and that upon evidence that was not authentic, and which this respondent had no opportunity to countervail or contradict.

2d. That the said Charles Morgan, by that petition, contrary to his social right and duty, did commence the suit ex parte, and did obtain the order of seizure and sale, and has executed the same without joining any creditor by bonds under the same instrument, although he had exact knowledge that he was not the only creditor under the mortgage he has assumed to control.

3. That your respondents, being informed, by a notice from the marshal, of his purpose to seize and sell the said property, did apply to the circuit court for an injunction upon a bill filed by your respondents in the said circuit court, wherein your respondents set forth at large their opposition to the order, the proceedings under it, and the jurisdiction over the same, and to the prosecution of it, and the court did, on the 24th April, 1869, only one day before the sale, refuse said motion; but although the said application had been pending from the day of the filing of the bill till the 24th of April, the said Morgan did cause the sale to be made the following day, to wit, the 25th April, 1869, as stated in the motion.

4th. The respondents aver that the notices of sale were not sufficient and the advertisements incomplete, and not in accordance with the code of practice, and that the appraisements were insufficient, and that the sale by the marshal is illegal and cannot be supported because of the failure to advertise, appraise, and give the suitable notices.

5th. Your respondents aver that the most manifest irregularity & illegality in the proceedings of the said Charles Morgan is made apparent by this rule. The property in which creditors are in-

terested has been sold and conveyed to one of the said creditors, and the said plaintiff and the marshal are compelled to make inquiry whose property they have thus appropriated by judicial process.

The respondents respectfully ask the court to examine on this motion the proceeding in the cause aforesaid, and the bill for the injunction filed on behalf of the respondents, the objections to the process, and the execution of the same as testimony, as well as records in the cause, and that your honor, after examination of the objection and complaint of these respondents, would set aside the original order of seizure and sale as having been illegally and improvidently granted, and all the subsequent proceedings thereon. That if your honor should decline to rescind the order of seizure and sale, that then that your honor would order that the sale be set aside and all the proceedings under it
77 be cancelled for the irregularities in the same.

These respondents protest that they have no interest in the distribution of the moneys, and that their title is to a restitution of the property, but they respectfully submit to the court that the marshal who made the sale has been removed from office, and that his successor is fulfilling his functions, and was so at a date prior to the sale, and that the magnitude of the cause, and the number of persons concerned in the funds, render it proper to enforce the 35 and 36 rules of this court against the ex-marshal who made the sale, by which all the monies received by the officers, and persons acting as officers thereof, arising from the sale of property in pursuance of any order or decision of the court, shall be paid into court by the marshal. That the court would direct suitable inquiries through a proper officer of the court, as to the mode of distribution and the persons entitled, and that the ex-marshal be discharged from further duty, and these defendants respect-
78 fully say that they are not amenable to such an order as is proposed in the motion of the said plaintiff.

(Signed) M. M. COHEN, and
CAMPBELL, SPOFFORD & CAMPBELL,
For the N. O., O. & G. W. R. R. Co.

Order, rule of June 1st, 1869, made absolute.—Extract from the minutes of Friday, June 18th, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

The rule of 1st of June came up—Miles Taylor, for plaintiff in rule; M. M. Cohen, for defendant—when, after hearing the answer to the rule and argument thereon, it is ordered that the rule be made absolute, and that the New Orleans, Opelousas, and Great Western Railroad Company furnish forthwith to F. J. Herron, acting in his capacity of late marshal, a statement of the number of bonds issued by the
79 said company, and now outstanding, and a statement of the number of coupons belonging to the said bonds which have been paid or extinguished by the said company, and shewing the number of the said bonds to which they belonged, and the numbers on the said coupons respectively, showing the dates at which they respectively matured, certified under the seal of the said company, and verified by the oaths of the president and secretary of the said company.

Motion and order to withdraw bonds and interest coupons.—Extract from the minutes of Tuesday, June 29th, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

On motion of Miles Taylor, of counsel for Charles Morgan, it is ordered that the said Charles Morgan have leave to withdraw the bonds and coupons as described in book on file in the cause, Exhibit
80 D, on giving a receipt for the same, endorsed or written on the said Exhibit D, on the grounds filed.

Motion for leave to withdraw bonds and interest coupons.—Filed June 29th, 1869.

U. S circuit court, district of Louisiana.

CHARLES MORGAN
vs
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Co. } No. 5788.

On motion of Miles Taylor, of counsel for Charles Morgan, and on suggesting to the court that the mortgaged property described in the petition has been sold under the process of the court to satisfy the mortgage debt as prayed for, and that the marshal being now about to make a distribution of the proceeds of the said sale, and of whatever realised under the said process, it is now necessary for the said Charles Morgan to withdraw the bonds and coupons of interest in the
81 possession of the court in the said cause, as evidence on which the said process was granted, in order that he may present them to the said marshal, so as to have the portion of the said proceeds of the said sale, &c., paid to him, and applied in part payment of the same:

It is ordered that the said Charles Morgan have leave to withdraw the said bonds and coupons as described in book on file in the case as Exhibit D, on giving a receipt for the same, endorsed or written on the said Exhibit D.

Petition for writ of error and order thereon.—Filed June 30th, 1869.

The United States of America, circuit court of the United States, district of Louisiana.

CHARLES MORGAN, PLAINTIFF,
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co., defendants. }

To the honorable the judges of the said circuit court:

The defendants, the New Orleans, Opelousas and Great Western Railroad Company, in the suit aforesaid, being aggrieved by
82 the judgment in the cause aforesaid, respectfully pray that the said court may allow a writ of error to the next term of the Supreme Court of the United States, to sit at Washington City on the first Mon-

terested has been sold and conveyed to one of the said creditors, and the said plaintiff and the marshal are compelled to make inquiry whose property they have thus appropriated by judicial process.

The respondents respectfully ask the court to examine on this motion the proceeding in the cause aforesaid, and the bill for the injunction filed on behalf of the respondents, the objections to the process, and the execution of the same as testimony, as well as records in the cause, and that your honor, after examination of the objection and complaint of these respondents, would set aside the original order of seizure and sale as having been illegally and improvidently granted, and all the subsequent proceedings thereon. That if your honor should decline to rescind the order of seizure and sale, that then that your honor would order that the sale be set aside and all the proceedings under it
77 be cancelled for the irregularities in the same.

These respondents protest that they have no interest in the distribution of the moneys, and that their title is to a restitution of the property, but they respectfully submit to the court that the marshal who made the sale has been removed from office, and that his successor is fulfilling his functions, and was so at a date prior to the sale, and that the magnitude of the cause, and the number of persons concerned in the funds, render it proper to enforce the 35 and 36 rules of this court against the ex-marshal who made the sale, by which all the monies received by the officers, and persons acting as officers thereof, arising from the sale of property in pursuance of any order or decision of the court, shall be paid into court by the marshal. That the court would direct suitable inquiries through a proper officer of the court, as to the mode of distribution and the persons entitled, and that the ex-marshal be discharged from further duty, and these defendants respect-
78 fully say that they are not amenable to such an order as is proposed in the motion of the said plaintiff.

(Signed) M. M. COHEN, and
CAMPBELL, SPOFFORD & CAMPBELL,
For the N. O., O. & G. W. R. R. Co.

Order, rule of June 1st, 1869, made absolute.—Extract from the minutes of Friday, June 18th, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

The rule of 1st of June came up—Miles Taylor, for plaintiff in rule; M. M. Cohen, for defendant—when, after hearing the answer to the rule and argument thereon, it is ordered that the rule be made absolute, and that the New Orleans, Opelousas, and Great Western Railroad Company furnish forthwith to F. J. Herron, acting in his capacity of late marshal, a statement of the number of bonds issued by the
79 said company, and now outstanding, and a statement of the number of coupons belonging to the said bonds which have been paid or extinguished by the said company, and shewing the number of the said bonds to which they belonged, and the numbers on the said coupons respectively, showing the dates at which they respectively matured, certified under the seal of the said company, and verified by the oaths of the president and secretary of the said company.

Motion and order to withdraw bonds and interest coupons.—Extract from the minutes of Tuesday, June 29th, 1869.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

On motion of Miles Taylor, of counsel for Charles Morgan, it is ordered that the said Charles Morgan have leave to withdraw the bonds and coupons as described in book on file in the cause, Exhibit
80 D, on giving a receipt for the same, endorsed or written on the said Exhibit D, on the grounds filed.

Motion for leave to withdraw bonds and interest coupons.—Filed June 29th, 1869.

U. S circuit court, district of Louisiana.

CHARLES MORGAN
vs
THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Co. } No. 5788.

On motion of Miles Taylor, of counsel for Charles Morgan, and on suggesting to the court that the mortgaged property described in the petition has been sold under the process of the court to satisfy the mortgage debt as prayed for, and that the marshal being now about to make a distribution of the proceeds of the said sale, and of whatever realised under the said process, it is now necessary for the said Charles Morgan to withdraw the bonds and coupons of interest in the
81 possession of the court in the said cause, as evidence on which the said process was granted, in order that he may present them to the said marshal, so as to have the portion of the said proceeds of the said sale, &c., paid to him, and applied in part payment of the same:

It is ordered that the said Charles Morgan have leave to withdraw the said bonds and coupons as described in book on file in the case as Exhibit D, on giving a receipt for the same, endorsed or written on the said Exhibit D.

Petition for writ of error and order thereon.—Filed June 30th, 1869.

The United States of America, circuit court of the United States, district of Louisiana.

CHARLES MORGAN, PLAINTIFF,
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co., defendants. }

To the honorable the judges of the said circuit court:

The defendants, the New Orleans, Opelousas and Great Western Railroad Company, in the suit aforesaid, being aggrieved by
82 the judgment in the cause aforesaid, respectfully pray that the said court may allow a writ of error to the next term of the Supreme Court of the United States, to sit at Washington City on the first Mon-

day of December next, and that the record, proceedings, orders, and judgments in the said cause may be certified to the said court according to law. That citation may issue to the said plaintiff, the defendants offer to give bond, with sureties, for the prosecution of their writ.

(Signed) M. M. COHEN, *for Def't.*

Order.

A writ of error is allowed in this case, as prayed for, and according to law, returnable to the Supreme Court of the United States on the first Monday of December next, the petitioners giving bond in the sum of five hundred dollars, with good and solvent security, conditioned as the law directs.

June 30th, 1869.

(Signed) E. H. DURELL, *Judge.*

83 *Bond for writ of error.—Filed July 8th*, 1869.

Know all men by these presents that we, the New Orleans, Opelousas and Great Western Railroad Company, as principal, and Samuel Smith, as surety, are held and firmly bound unto Charles Morgan in the full and just sum of five hundred dollars, to be paid to the said Charles Morgan, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 7th day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Charles Morgan was plaintiff, and the New Orleans, Opelousas and Great Western Railroad Company was defendant, judgment was rendered against the said

84 New Orleans, Opelousas and Great Western Railroad Company, defendant, and the said New Orleans, Opelousas and Great Western Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Morgan, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said New Orleans, Opelousas and Great Western Railroad Company shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) A. B. SEGER, *President.* [L. S.]
(") SAM. SMITH. [L. S.]

Sealed and delivered in the presence of—
(Signed) M. M. COHEN.

85 U. S. circuit court.

NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Co. *vs.* CHARLES MORGAN. } 5817.—In chancery.

Record in above cause referred to in the petition of defendants.—Filed and submitted June 1st, 1869.

Bill.—Filed April 5th, 1869.

To the honorable the judges of the circuit court of the United States for the district of Louisiana:

The New Orleans, Opelousas and Great Western Railroad Company, a corporation existing by the laws of Louisiana, and domiciled in the city of New Orleans, bring this their bill against Charles Morgan, a citizen of the State of New York, found in New Orleans, in the district of Louisiana.

And thereupon your orators complain and say that, by an act of the legislature of the State of Louisiana, which became a law the 22d
86 April, 1853, they were recognised as a body corporate under an act to provide for the organization of corporations, March 11th, 1852; their association adopted, and their powers, privileges, and rights enlarged. And that, by a number of the acts of the legislature, they have since that time been treated as a corporation; aid has been extended to them by the State to aid their enterprise; and the city of New Orleans, under their authority, has subscribed for their stock; public lands have been granted to them, and authority conferred upon them to borrow money, to mortgage their rights, estates, and privileges, for the repayment thereof, and to issue bonds, with coupons attached, the interest to be paid in New Orleans, New York, or London, at their election; and to do other acts for the advancement of their undertaking, as described in their act of incorporation. All of which will more fully appear by a reference to the public acts of the legislature, to which your orators crave reference as a part of their bill as well as to those acts which refer to the company alone.

87 Your orators further complain and say that, under those powers, your orators, in the year 1859, caused to be prepared two thousand bonds for one thousand dollars each, payable to E. J. Forstall, at that time, and now a citizen of the State of Louisiana, and a resident in New Orleans; and then and there made a contract with the said E. J. Forstall for the security of the same and for the indemnification of the holders of the said bonds; a printed copy whereof is hereunto attached, marked "A," as an exhibit to this bill, and which your orators pray may be taken as a part hereof.

Your orators further complain and say that, under the said mortgage, the bonds were placed in the markets of New York, London, and New Orleans, and elsewhere, and above nineteen hundred of the same are in circulation among a great number of holders, who reside in Louisiana and other parts of the United States, and some of whom are beyond the limits of the U. S., and subjects of foreign States in conditions of friendship with the United States.

88 4. Your orators further complain and say that one Charles Morgan, who claims to be a citizen of New York, but whose residence and business are, for a portion of the year, in the city of New Orleans, has appeared before one of your honors with a petition, in which, after representing the facts of the incorporation of your orators, and the mortgage and issue of bonds under the same, as aforesaid, avers that he is the holder of eight hundred and forty (840) of the said bonds; and that he is the legal holder of three thousand six hundred and twenty-five (3,625) coupons of forty dollars each, which are past due and unpaid; and that he holds besides four thousand two hundred and ninety-

six, (4,296,) which belonged to and were attached to other bonds issued by the said company, under the mortgage aforesaid,and detached therefrom, and which bonds, he affirms, bear the notarial mark of ne varietur, but which fact he has not authenticated by the production of the bonds themselves; nor is there any mark alleged [alleged] to exist on
89 the said last-mentioned coupons; nor is there in fact any mark on said coupons, nor notarial identification of them as coupons at all, subjecting them to the operation of the mortgage in a suit of this description.

5. Your orators further complain and say that the said Charles Morgan, in his petition, represents that there are fifteen thousand four hundred and sixty-five coupons unpaid, and has filed, as evidence, a report of the company making a debt due of six hundred and six thousand six hundred dollars, ($606,600,) and, assuming to represent the creditors of the corporation, has applied to the court for a summary order of seizure and sale of the property of the corporation, for the amount of the supposed debt, without production of other evidence than he has submitted as aforesaid, or authority for his action. No bonds or coupons have been filed or exhibited, except those which he holds himself with his petition; nor is the name of any holder stated or suggested.

6. Your orators further complain and say that the judge of the court has issued an order of seizure and for the sale of the property de-
90 scribed in the mortgage, unless the defendant shall pay to the plaintiff the debt aforesaid claimed by him, upon the evidence thus set forth; and in case of default, that the property shall be sold for the payment in cash of the ($606,600) sum which the petitioner alleges to be the outstanding debt of unpaid coupons, nearly one-half of which ($289,760) he does not represent and does not hold; and the authentic evidence of which he has not exhibited conformably to the law of the procedure he has adopted.

7. Your orators further complain and say that they have had no other notice of the proceedings aforesaid than of the fact of the seizure, and proposed execution of the order. The petition has not been served upon them with any citation to make an answer thereto; and the order does not purport to be a judgment of the court ascertaining debt and default of payment, but is a complete and perfect authority to the marshal to sell; all of which will manifestly appear by reference to the proceedings in the said cause, which are on file among the records of this court, and to which your orators crave reference, in the same
91 manner as if they were fully represented and set forth in this bill as an exhibit to the same.

8th. And your orators further complain and say that they have been advised that the process adopted by the defendant in this cause is illegal and unjust; that every holder of the bonds of the said company has an equal right to that of the plaintiff in the mortgage aforesaid, and a right to examine into, and to inquire of, the authenticity and validity of the claims of the plaintiff, and to propound his own claims, and to be heard by the court as to the manner of selling or dealing with the said property, and that no disposition of this common and social right should be made until all the holders of the bonds have been made parties, or are properly represented in court.

9. And your orators further complain and say that by the acts of Congress no suits can be made in the circuit court of the United States unless process be served on the party, and that no process has issued in this cause.

92 10. And your orators further complain and say that, under the acts

of Congress, the circuit court of the United States can have no cognizance of any suit to recover the contents of a mortgage, in favor of any assignee, unless his assignor could maintain the suit, and that it appears on the face of the mortgage that the claim of the said plaintiff under his mortgage is derived from the acceptance of the same, and subrogation of his right therein by E. J. Forstall, who then was, and from thence hitherto has been, and now is, a citizen of the State of Louisiana, and that there is not upon the petition or other proceedings of the said Charles Morgan any averment to the contrary hereof, and no averment of the fact of the citizenship of said W. J. Forstall.

11. Your orators further complain and say that, by the Constitution of the United States, the judicial power of the United States is vested in courts wherein cases of law and equity may be decided, according to due cause of law or equity; that the enforcement of a security like the present is a proceeding cognizable only in a court of equity, and
93 that the number of the persons interested, the extent of the interests involved, the nature of the property mortgaged, and the magnitude of the property and of the incumbrances, make it a case appropriate only to an equitable tribunal; that the modes of proceeding at law are unfitted for the determination of the rights involved, and for the disposition of the estate, and that the proceedings adopted by the said defendant is not appropriate nor suited to the case, nor consistent with the laws of the United States.

12. Your orators further complain and say that the property subject to the operation of this process is estimated to be worth about three millions of dollars, and consists of a railroad and its equipments; that on a sale upon thirty days' notice the same cannot fail to be sacrificed; that the process being of doubtful legality, the jurisdiction of the judge to order it being unsettled by decision, and the uncertainties attending it, would operate to depress and diminish the value of the property sold.

Your orators further say that the effects of the seizure has
94 been pernicious, and that the interests of all parties require that the sale, if one be required, shall take place in the orderly and regular course of judicial procedure in equity.

13. Your orators further complain and say that even if the mode of procedure adopted by defendant is allowable, under any conditions, in the courts of the United States for Louisiana, it is not proper under the conditions of this case. Many of the creditors of the company reside in Europe; others in different parts of the United States. The corporation is indebted to others upon a second mortgage and upon account; the property of the corporation is not of a nature to obtain purchasers readily. There is a necessity for concert, co-operation, and interview among creditors.

There are public and private interests involved in the daily operations of the road. The public considerations that prevented Congress from making railroads subject to bankrupt laws apply with tenfold force to making them subject to the abnormal proceeding known in Louisiana as executory process, a proceeding coming as an inheritance from
95 Spain, and which, in its nature and application, is contrary to the procedure of courts of law and equity which the framers of the Constitution of the United States contemplated as repositories of their judicial power.

Your orators aver that the said Charles Morgan is a capitalist, and has purchased a large amount of the debt of the corporation, under the depressed circumstances of the corporation since the termination of the war; that these depressed circumstances are owing to political and pub-

lic conditions that were not under the control of the corporation, or of its managers. But neither the amount of his securities nor the circumstances of his purchase give to him any interest in the mortgage above that of other holders of bonds. He is a partner, and his obligation and duty are to preserve with fidelity the social claims of every other bondholder. But such a sale as is contemplated would give to him an advantage for his capital and the amount of his debt, that
96 no other creditor would have at the sale, and, if he be disposed, to enable him to buy the effects of the corporation at a price, compared to their value, which would be nominal, and thus give to him a leonine control of the liquidation of the partnership interests.

Your orators further complain and say that the stockholders have interests which should also be regarded, and no sale should be made which did not present favorable conditions for obtaining the full value of the property; that the State of Louisiana and city of New Orleans are stockholders under the acts of the legislature before referred to. To the end, therefore, that the said Charles Morgan may be made a party to this bill, and that he may make an answer to the same, and especially that he may answer the charges and allegations of the same as if they were repeated, and he distinctly interrogated thereto; and your orators pray that the said Charles Morgan be enjoined and restrained from proceeding with his executory process, and that the advertisement
97 of sale be prevented, and that the seizure be set aside, and that the said Charles Morgan be required to file a bill on the chancery side of this court, if he proceeds further, to which all the mortgage creditors, together with your orators, may be made parties or be represented.

And your orators pray that the court may make suitable orders for the protection of the property of the corporation from seizure, and that its operations be regulated, if continued under seizure; and that such other and further relief be granted as may be consistent with equity and good conscience.

(Signed) M. M. COHEN, *Solicitor.*

CIRCUIT COURT OF THE UNITED STATES, *District of Louisiana:*

Before me, clerk of the circuit court aforesaid, comes A. B. Seger, president of the said corporation, who maketh oath and saith that the bill filed by said corporation in said court is true in substance and matter of fact.

(Signed) A. B. SEGER.

98 Sworn to and subscribed before me this 5th April, 1869.

(Signed) D. URBAN, *Clerk.*

Exhibit marked "A," referred to in, and filed with, the foregoing bill.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that this day, before me, Selim Magner, a notary public in and for this city and parish of New Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared William G. Hewes, esq., of this city, president of the New Orleans, Opelousas and Great Western Railroad Company, a duly incorporated institution of this State, and herein acting in his said capacity, by virtue and in pursuance of the resolutions of the board of directors of said company, passed on the seventeenth day of March, eighteen hundred and fifty-nine, which resolutions, duly certified copies whereof are hereunto in the

margin annexed for reference, are in the words and figures following, to wit:

99 1*st. Resolved*, That for the purpose of obtaining means for the further construction of the road, the president be, and he is hereby, authorized and instructed to issue two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, dated first April, 1859, redeemable on the first April, 1889, for one thousand dollars each, bearing interest at the rate of eight per cent. per annum, payable semi-annually, in coupons attached to said bonds of eight pounds five shillings sterling, or forty dollars, each, the principal of said bonds being made payable at their office in New Orleans, and the interest thereof being made payable in New Orleans, New York, or London, as the president, by his endorsement, may determine.

2*d. Resolved*, That the president be further authorized and instructed to secure the payment of said bonds, and the interest thereon, by a first mortgage on the first grand division of the railroad of the company from Algiers (opposite the city of New Orleans) to Berwick's Bay, together with the land over which said road is constructed, the
100 equipments, appurtenances, rights, and franchises of the company, applicable to this portion of the road.

3*d. Resolved*, That such an amount of money as may be necessary to meet each semi-annual interest of the outstanding bonds of the company shall be provided for, pro rata, by monthly deposits in the Louisiana State Bank of this city, and entered as follows: "The New Orleans, Opelousas and Great Western Railroad Company's interest account;" and all funds so deposited shall be considered special, and shall not be used for any other purpose than for the payment by said bank of running interests on the bonds of the company, as maturing. And the president is hereby authorized to sign an act of agreement with the president of said bank, binding the company as aforesaid.

4*th. Resolved*, That in case the Louisiana State Bank should decline to continue to be the agents of said New Orleans, Opelousas and Great Western Railroad Company, or in case the charter of said bank
101 should expire, then the president of this company shall choose any other of the chartered banks in this city for the carrying out of the purposes of these resolutions.

Which said appearer declared, that in pursuance of the above-recited resolutions, and also by virtue of the authority conferred upon said company by, first, the ninth section of an act of the legislature of the said State of Louisiana, entitled "An act to incorporate the New Orleans, Opelousas and Great Western Railroad Company," duly approved on the twenty-second day of April, 1853, (No. 149;) and, second, by another act of the same legislature duly approved on the twentieth day of March, 1856, entitled "An act to extend the powers of railroad companies," (No. 194,) he has in his capacity aforesaid this day issued two thousand bonds of the New Orleans, Opelousas and Great Western Railroad Company, signed by him, and by Benjamin F. Flanders, treasurer of said company, redeemable on the first day of April, eighteen hundred and eighty-nine, for the sum of one thousand dollars ($1,000) each,
102 bearing interest at the rate of eight per cent. per annum, payable semi-annually, in coupons of forty dollars, or eight pounds five shillings sterling, each, the principal of said bonds being made payable at the office of the company, in the city of New Orleans, and the interest coupons in New Orleans, New York, or London, as he, the said president, may, by his endorsement, provide, and all which bonds have

been severally marked "ne varietur," and countersigned by me, the said notary, for the purpose of more effectually identifying the same herewith.

Now, therefore, in consideration of the premises, and in order to secure the full, faithful, and punctual payment, and the redemption of each and all the said bonds (this day issued as aforesaid) to any future holder or holders thereof, and to each and every one of them, when the same shall become due and payable, together with the interest accruing thereon, in the manner and at the periods of time hereinabove stipulated, as evidenced by the coupons attached to the said bonds, re-
103 spectively, payable on the first days of April and October of each year, the said "New Orleans, Opelousas and Great Western Railroad Company" do, by these presents, by their president, (the said William G. Hewes,) grant in favor of E. J. Forstall, or bearer, as well as in favor of all and every person and persons whomsoever, who may become the holder or holders of said bonds, or coupons, or any of them, a first mortgage, lien, or privilege upon the whole of the completed grand division of the railroad between Algiers (opposite the city of New Orleans) and Berwick's Bay, now in full operation, constructed by the said company in pursuance of their charter, and being a distance of eighty miles, together with the road-beds of the main track and branches, and also all the depots and lands specially appertaining to them; all the buildings, wharves, and all the equipments and franchises belonging and appertaining to this division of the road, herein mortgaged and referred to, and also all and singular the cars, locomotives, engines, wagons,
104 machinery, fixtures, utensils, implements, rights of way, and effects generally, of every nature and description whatsoever, in use upon the said division of the said railroad, or in any wise attached to or appertaining to the same, without any exception or reservation, as well as all such as shall or may hereafter at any time be placed upon or attached to the said division of the said railroad, whether for the purpose of replacing others removed therefrom, or from any other cause whatsoever, the said company promising, by their said president, not to alienate nor encumber, nor in any wise affect the same, or any part or portion thereof, to the prejudice of these presents.

By reference to the annexed certificates of the recorders of mortgages in and for the parishes of Orleans, Jefferson, Saint Charles, Lafourche Interior, Assumption, Terrebonne, and St. Mary, respectively, traversed by the said division of the said railroad* herein mortgaged, it will appear that there exists no mortgage or encumbrance whatsoever inscribed against the said division of the said railroad,* franchises, and appurtenances, nor upon
105 any of the lands or property connected therewith owned by the said company.

"This reference approved." — D. Urban, U. S. com'r.

And now personally came and appeared the said Edmond J. Forstall, who, after having read the foregoing act of mortgage, declared that he does, by these presents, accept the same, as well for himself as for all and every other person or persons who may hereafter become the purchaser or purchasers, assignee or assignees, holder or holders, of the said bonds or coupons, or any number thereof, or any of them, together with all the rights, privileges, and benefits thereto belonging, or in any wise appertaining.

Thus done and passed in my office, at the said city of New Orleans, in the presence of Edward G. Gottschalk and Forester Brugier, witnesses of lawful age, domiciliated in this city, who hereunto subscribe their names, together with the said parties, and me, the said notary, on the

first day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

WILLIAM G. HEWES, *President.*
EDMOND J. FORSTALL.
E. G. GOTTSCHALK.
F. BRUGIER.
106 S. MAGNER, *Not. Pub.*

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that this day, before me, Selim Magner, a notary public in and for this city and parish of New Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared William G. Hewes, esq., of this city, president of the "New Orleans, Opelousas and Great Western Railroad Company," a corporation duly organized under the laws of this State, herein acting in his said capacity by virtue of a resolution of the board of directors of said company passed at their meeting of the 17th March, 1859, a certified copy of which resolutions is annexed in the margin hereof for reference, of the one part, and Edmond J. Forstall, esq., of this city, of the second part; and the said Hewes declared that, whereas the said company executed a mortgage on the railroad of said company, its property, rights, privileges,
107 franchises, and appurtenances, as a security for the payment of two thousand bonds of one thousand dollars each, issued by said company, and payable thirty years from this date, with interest at eight per cent. per annum, payable semi-annually on the first day of April and the first day of October of each year, as per act passed before the undersigned notary on the date hereof, which mortgage was made in favor of him the said E. J. Forstall and any future holder or holders of said bonds, and was intended to enure to the benefit of any such holder or holders of said bonds, or any of them, as might at any time become beneficially interested in the security of such mortgage.

Now, therefore, in order to further secure the punctual payment of the interest of said bonds, represented by coupons attached thereto, payable semi-annually, and in order to facilitate their negotiability, by furnishing guarantees of the punctual payment of said interest, the said company, in pursuance of said recited resolutions of the board of
108 directors, does hereby contract and agree with said E. J. Forstall, hereing acting, not only for himself, but in the interest of all persons who may be or become beneficially interested in the said bonds, each and every one of whom he subrogates in and to all his rights and actions under said act of this date, and under the present act, up to the amount of the interest of each and every of said persons, respectively, as follows, to wit:

1st. That the treasurer of said company for the time being, or any other officers discharging the duties of treasurer, shall, on the last day of April next, and on the last day of every month until the final payment of said bonds, deposit in the Louisiana State Bank of this city, pro rata, an amount of money necessary to meet each semi-annual interest of the outstanding bonds of the company, to be entered as the "New Orleans, Opelousas and Great Western Railroad Company's interest account," and such additional amount as may be necessary to pay exchange and other expenses of placing funds at the place
109 where the interest coupons may be payable; and the money thus deposited shall not be withdrawn by the said company or any officer thereof, but shall remain on deposit in said bank, and be by said bank exclusively applied to the payment of the interest coupons on said

bonds, and said expenses and exchange; and no payment shall be made by said bank, out of said deposits, on the check of any person or persons whomsoever, but the payments out of said deposits shall be made on presentation of said coupons as above provided, which shall be cancelled on payment, and delivered by said bank to the treasurer, taking his receipt therefor, provided, that the said bank shall remit funds to meet at maturity all of said coupons, payable in London or New York.

2d. That the said company shall have the right to select any one of the chartered banks in this city for the purposes aforesaid, in case the charter of the Louisiana State Bank should expire prior to the payment of the interest coupons aforementioned, or in case the said bank
110 should decline to continue said deposits before the time contemplated.

And to these presents personally came and appeared and intervened, Jean Martial Lapeyre, esquire, president of the said Louisiana State Bank, and acting herein by virtue of a resolution of the board of directors of said bank, passed at their meeting of the 18th March, 1859, a certified copy whereof is hereto annexed, who declared that the president, directors, and company of said bank do hereby take cognizance of the present act, and agree to receive and keep the above-mentioned deposits, and make the payments therein provided, out of the same, in conformity hereto; provided, that should said bank decline to continue this arrangement, it shall be at liberty to do so after giving six months' notice to said railroad company; and the board of directors of the said railroad company shall thereupon select another incorporated bank in this
111 city to become the depositary of the funds under this act, which bank shall assume all the obligations herein imposed on the Louisiana State Bank, and shall be entitled to exact the performance of all those imposed on said company, its directors, or officers.

Thus done and passed in my office, at the said city of New Orleans, in the presence of Edward G. Gottschalk and Forester Brugier, witnesses of lawful age, domiciliated in this city, who hereunto sign their names, together with the said parties, and me, the said notary, on this first day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

WILLIAM G. HEWES, *President.*
EDMOND J. FORSTALL.
J. M. LAPEYRE, *President.*
E. G. GOTTSCHALK.
F. BRUGIER.
S. MAGNER, *Not. Pub.*

Extract from the minutes.

LOUISIANA STATE BANK, 18*th March*, 1859.

Whereas "the New Orleans, Opelousas and Great Western
112 Railroad Company" have selected this bank as the depositary of certain moneys for the purpose of paying the interest coupons attached to certain mortgage bonds to be issued by said company, and to be secured by special mortgage by a notarial act:

Resolved, That this bank accept of said deposit in accordance with the resolutions of the board of directors of said railroad company passed on the 17th day of March, 1859; and the president is hereby authorized to sign a contract with said company to that effect: *Provided*, That should the bank decline to continue this arrangement before the ex-

piration of the time contemplated, it shall give six months' previous notice of such intention to said railroad company: *Provided also*, That the bank shall be under no obligations to advance any money for the use of said company, nor to allow any interest on any sums deposited by virtue of said resolutions of 17th March: *And provided further*,
113 That any expense, of whatever nature, the bank may have to incur to pay the interest coupons outside of New Orleans shall be reimbursed by the said railroad company.

A true copy.
Attest: C. F. RONDEAU, *Cashier.*

Subpœna in chancery.—Issued April 5th, 1869.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon Charles Morgan, a citizen of the State of New York, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of May, 1869, then and there to answer to a bill in chancery filed against him, wherein the New Orleans, Opelousas and Great Western Railroad Company are complainants, and said Charles Morgan is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.
114 Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 5th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and the 93d year of American independence.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clk.*

The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of May, 1869, otherwise the bill may be taken pro confesso.

(Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received, April 6th, 1869, by the U. S. marshal, and on 7th day of April, 1869, served copy of within subpœna on Charles Morgan, defendant named herein, personally, at office, corner of Magazine and Natchez streets, in this city.

New Orleans, April 7th, 1869.
115 (Signed) S. W. REED,
D'y U. S. Marshal.

Entry at rules.—Extract from the chancery order docket, April rules, 1869.

Circuit court of the United States, district of Louisiana, at rules.—April 5th, 1869, being the 1st Monday of the month.

On motion of M. M. Cohen, solicitor of the plaintiffs, and upon a sub-

mission of this bill, the court orders that notice of the motion for an injunction be given to said Morgan, or his attorney; the motion to be heard on the 16th day of April, 1869, at 11 a. m.

(Signed) E. H. DURELL, *Judge.*

Motion.—Extract from the minutes of Friday, April 16th, 1869.

NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company *vs.* CHARLES MORGAN. } No. 5817.

And now into court comes Charles Morgan, by Miles Taylor,
116 and moves the court for leave to file in support of his opposition to granting the motion in this cause, made for an injunction to issue as prayed for in the bill of complaint against him filed therein, the two papers now presented, as follows:

1st. The affidavit of Charles A. Whitney, with the accompanying statement or certificate made by the clerk of the court, in his official capacity, on the 23d of February, 1869, in the case of Charles Morgan vs. the New Orleans, Opelousas and Great Western Railroad Company, No. 5788 of the docket of this court; and

2d. The return made by the marshal of the United States for the district of Louisiana, of the service made in the New Orleans, Opelousas and Great Western Railroad Company, in the said case of Charles Morgan vs. the New Orleans, Opelousas and Great Western Railroad Company, No. 5788 of the docket of this court, on the day of , 1869.

Affidavit of Charles A. Whitney, referred to in the foregoing motion.—Filed April 16th, 1869.

117 U. S. circuit court, district of Louisiana.

THE NEW ORLEANS, OPELOUSAS AND GREAT Western Railroad Company *vs.* CHARLES MORGAN. } No. 5817.

Charles A. Whitney, of the city of New Orleans, to me well known, being duly sworn, deposes and says:

That he is a member of the firm of Charles A. Whitney & Co., agents of Charles Morgan, plaintiff in the suit of Charles Morgan vs. the New Orleans, Opelousas and Great Western Railroad Company, No. 5788 of the docket of the circuit court of the United States for the district of Louisiana. That acting in his capacity of agent of the said Charles Morgan, he placed in the hands and possession of the clerk of the said circuit court on the 23d day of February, (the day when the petition in the said case was filed in the said circuit court,) the bonds and the interest coupons issued by the said New Orleans, Opelousas
118 and Great Western Railroad Company, which are declared in the petition filed in the said cause, No. 5788, on that day to be annexed for reference, and made part of the said petition and to be set forth, enumerated, and described in the book filed with the said petition and marked D; and that on the same day, to wit, the 23d day of February, 1869, the clerk of the said court gave a statement in writ-

ing, signed by him in his official capacity, that the said bonds and coupons of interest and various other papers, had been filed or deposited on that day with the clerk of the said court, as annexed to & made a part of the said petition aforesaid, by Miles Taylor, the attorney for the said Charles Morgan, as will be more fully seen by reference to the said statement, which is hereto annexed as part of this affidavit.

(Signed) CHAS. A. WHITNEY.

Sworn to and subscribed before me April 16th, 1869.

(Signed) F. B. VINOT, *D'y Clk.*

Statement or certificate of the clerk referred to in the foregoing
119 motion and affidavit to be found transcribed at page 32.

The return made by the marshal of service on the New Orleans, Opelousas & Great Western Railroad Co., in the case of Charles Morgan versus the New Orleans, Opelousas & Great Western Railroad Co., filed in this case on 16th April, 1869, and referred to in the foregoing motion.

U. S. circuit court.

CHARLES MORGAN
vs.
NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company. } No. 5788.

To the New Orleans, Opelousas and Great Western Railroad Company:

By virtue of a writ of seizure and sale issued and to me directed, by the honorable circuit court of the United States for the fifth circuit and district of Louisiana, in the above-entitled suit, I hereby notify you to pay into my hands, within three days from the service of this notice, three hundred and sixteen thousand eight hundred and
120 forty dollars, due to the plaintiff, and the costs; and that in default of such payment, I shall seize and sell the property described in the accompanying petition and order served herewith, to satisfy the mortgage debt, agreeably to the said order and according to law.

(Signed) JOHN FAHY,
D'y Marshal.

U. S. MARSHAL'S OFFICE, *New Orleans, March 31st*, 1869.

Marshal's return thereon.

Notice of demand issued March 31st, 1869, and on the same day served a copy of the within notice and copy of the petition and order in the said case accompanying same on the New Orleans, Opelousas and Great Western Railroad Co., by delivering them to A. B. Seger, president of said company, at their domicil, No. 69 Canal street, in the city of New Orleans.

New Orleans, March 31st, 1869.

(Signed) JOHN FAHY,
D'y Marshal.

121 *Hearing and continuance of rule.—Extract from the minutes of Friday, April 16th*, 1869.

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co.
vs.
CHARLES MORGAN. } No. 5817.

The rule taken by complainant on 5th instant came up—M. M. Cohen,

and Campbell, Spofford & Campbell, for complainant; Miles Taylor for defendant—when after hearing argument the same is continued till to-morrow at 11 a. m.

Hearing and continuance of rule.—Extract from the minutes of Saturday, April 17th, 1869.

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co.
vs.
CHARLES MORGAN. } No. 5817.

The rule in this case was resumed, and, after hearing further evidence, continued till Wednesday, 21st instant, at 11 a. m.

122 *Motion & order refixing rule.—Extract from the minutes of Friday, April 23d, 1869.*

NEW ORLEANS, OPELOUSAS & GREAT WESTERN Railroad Co.
vs.
CHARLES MORGAN. } No. 5817.

On motion of Miles Taylor, solicitor for the defendant, ordered that the rule taken by complainant on 5th instant be set for argument on Thursday, 29th instant, at 11 a.m., and that said complainant be notified hereof.

Marshal's return.

Received, April 24th, 1869, by the U. S. marshal, and on same day of April, 1869, served copy of within motion, &c., on M. M. Cohen, attorney named, personally at U. S. court-room in this city; and on same day of April, 1869, served copy of same on Campbell, Spofford & Campbell, attorneys named, in hands of J. A. Campbell, member of firm, at U. S. court-room in this city.

New Orleans, April 27th, 1869.

(Signed) J. W. SAWYER,
D'y U. S. Marshal.

123 *Hearing & submission of rule.—Extract from the minutes of Tuesday, April 27th, 1869.*

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Co.
vs.
CHARLES MORGAN. } No. 5817.

The rule pending in this case was taken up—Campbell, Spofford & Campbell and M. M. Cohen for plaintiffs in rule; Miles Taylor for defendant in rule—and after hearing argument, the court took time to advise and instructed the counsel to furnish printed briefs within the next ten days.

Entry at rules.—Extract from the chancery order docket.

May rules, 1869.—Monday, 3d.

NEW ORLEANS, OPELOUSAS & GREAT WESTERN Railroad Co.
vs.
CHARLES MORGAN. } No. 5817.

The defendant, by his solicitor, Miles Taylor, esq., this day made his appearance to complainant's bill.

124 *Judgment.—Extract from judgment docket.*

United States circuit court, fifth circuit and district of Louisiana.—April term, 1869.

NEW ORLEANS, *Monday, May 24th*, 1869.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN Railroad Company
vs.
CHARLES MORGAN. } No. 5817.

For reasons orally assigned, it is ordered and decreed that the prayer for an injunction be denied, with costs.

Judgment rendered May 24th, 1869. Judgment signed May 28th, 1869.

(Signed) E. H. DURELL, *Judge.*

125 United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE:

I, Dominick Urban, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 124 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Charles Morgan vs. the New Orleans Opelousas and Great Western Railroad Co., No. 5788 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30th day of November, A. D. 1869.

[SEAL.] D. URBAN, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of November, A. D. 1869.

E. H. DURELL, *Judge.*

[Five-cent internal revenue stamp affixed and canceled.]

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or one of you, between the New Orleans, Opelousas and Great Western Railroad Company and Charles Morgan, a manifest error hath happened, to the great damage of the said New Orleans, Opelousas and Great Western Railroad Company, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 24th of May, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court
For District of Louisiana.

127 (Indorsed:) United States circuit court. No. 5788. Charles Morgan vs. the New Orleans, Opelousas and Great Western Railroad Company. Writ of error.

Filed May 24, 1869.

F. B. VINOT, *D'y Cl'k.*

128 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Charles Morgan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein the New Orleans, Opelousas & Great Western Railroad Company are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

E. H. DURELL, *Judge.*

129 (Indorsed:) United States circuit court. No. 5788. The New Orleans, Opelousas & Great Western Railroad Co., plaintiffs in error, vs. Charles Morgan. Citation.

Marshal's return.

Served on the 9th of July, A. D. 1869, on Miles Taylor, att'y for Chas. Morgan, in the hall of custom-house.

S. W. REED,
D'y U. S. Marshal.

(Indorsement on cover:) No. 321. The New Orleans, Opelousas and Great Western Railroad Company, plaintiffs in error, vs. Charles Morgan. Louisiana C. C. U. S.
Filed 6th December, 1869.

Supreme Court United States.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN R. R. Co.,
vs.
CHARLES MORGAN.
No. 123.

BRIEF OF P. PHILLIPS.

The appellee, Morgan, filed his petition in the Circuit Court United States for the District of Louisiana, averring that he was the holder of certain bonds and coupons issued by the appellant, the payment of which was secured by a mortgage of the company executed on the 1st of April, 1859.

On this petition, without any notice or citation having been ordered or served on the company, the circuit judge on 30th March issued an order for executory process, by which it is directed that if the company fail to pay, within three days after demand, the sum of $316,840, the mortgage property should be sold for the whole debt secured by the mortgage.

Rec., p. 5.

By the code of practice existing when the act of Congress of 1824 adopting the State practice was passed, this executory process was permitted not only in reference to

mortgages, but also in cases where the creditor demands the execution of a judgment rendered in another State, or in a foreign country.

Code Prac., Arts. 732, 733, 746.

Without notice the execution may issue to the debtor, or, if he be dead, *to his heirs*, and it may also issue against the third possessors of the things on which the privilege extends. In the case of a mortgage the specific property is seized, and in that of a judgment recovered in another State the property, generally, of the debtor is subjected to the execution.

An appeal lies from this order of seizure in the State Courts to the Supreme Court, but on that appeal nothing can be considered but the regularity of the order and the fact whether the authentic evidence of the debt and mortgage was produced.

The only other remedy is by a petition for injunction *to arrest the sale*, addressed to the Court which directed the execution. This must be sworn to, and must be based upon one of the following grounds:

1. That the debt has been paid.

2. That it has been remitted.

3. That it has been extinguished by transaction or novation.

4. That time has been granted for the payment, though not mentioned in the contract.

5. That the act containing the privilege or mortgage is forged.

6. That it was obtained by fraud, violence, fear, or some other unlawful means.

7. That he has a liquidated account to plead in compensation of the debt claimed.

8. And, finally, that the action for the recovery of the debt is barred by prescription.

Arts. 738, 739.

On this petition the judge is required to act summarily on the merits of the opposition, and this summary proceeding is to be had without trial by jury.

Arts. 740, 757.

The appellants on being notified of the order of seizure, filed their bill in the Circuit Court to enjoin the sale, but the question on the injunction was held up while the seizure and advertisement went on, and the refusal of the injunction was only announced the day before the sale took place.

There was no remedy, on the order of the Circuit Court by appeal, or writ of error, as there would have been if the proceedings had been in a State Court—because such an order is not a final judgment or decree within the meaning of the Judicary Act.

Levy v. Fitzpatrick, 15 Pet., 115.

The sale took place on the 25th May, 1869, when Morgan became the purchaser of the mortgaged premises.

The company being without other remedy, appeared then for the first time on the law side of the Circuit Court, and applied for an audita querela, to examine into the grievances alleged. This was answered by Morgan, and the following judgment rendered:

"The Court having duly considered the petition and exhibits submitted by the petitioner in this cause, and being satisfied that the prayer thereof cannot be granted,

it is ordered and decreed that the said petition be dismissed with costs.

Judgment rendered 14th June, 1869.

Judgment signed 18th June, 1869.

E. H. DURELL, *Judge.*

The writ of error now before the Court is to reverse this judgment, and two questions are presented—

First. Can the Circuit Court exercise jurisdiction over proceedings by executory process, as provided by the State practice?

Second. If it can, has it proceeded regularity according to the requirements of that practice?

JURISDICTION.

The Judicary Act in its 11th section confers on the Circuit Court jurisdiction in "all *suits* of a civil nature at *common law* or *in equity*," where the United States are plaintiffs, or where an alien is a party or the "suit is between a citizen of the State where the suit is brought, and a citizen of another State."

The jurisdiction is claimed by Morgan on the ground that he is a citizen of the State of New York, and the corporation is a citizen of Louisiana. But is his petition for an execution and its award by the Court without notice to the opposing party a "suit" within the meaning of the act?

The Constitution declares that the "judicial power shall extend to all cases in *law* and *equity*. These cases at common law, refer to the *common law* of England, and with which the States were familiar. The Constitution thus

adopts the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union.

A "case" within the constitutional sense arises when some subject touching the Constitution, laws or treaties is submitted to the Courts by a party who asserts his rights in the *forms prescribed by law.*

In other words, a "case" is a suit in law or equity instituted *according to the regular course of judicial proceedings.*

2 Story's Coms., § 1645, 1646.

In Osborn v. Bank of United States, the Chief Justice says the judicial power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the *form prescribed by law.* It then becomes a "case" to which the constitution extends. 9 Wheat., 738.

In Weston v. City of Charleston it was contended that a writ of error would only lie under the 25th section from a judgment or decree "in a suit in the highest court of law or equity of a State," and that the proceeding on a prohibition did not constitute a "suit."

The Chief Justice, speaking for the court, says, that the mode of proceeding in courts of justice are various, but if a right is *litigated between parties* in a court of justice, the proceeding by which the decision of the court is sought is a "suit."

The constitutionality of the ordinance is contested, the party agrieved by it applies to a court, and at his suggestion the writ of prohibition is issued. The opposite party appeals, and in the highest court the judgment is reversed, and judgment given for defendant. This judg-

ment was rendered in a "suit." 2. Pet. 464.

This definition of a "suit," within the meaning of the act of 1789, is quoted with approbation in the case of Holmes v. Jennison by Taney, C. J., and concurred in by Story, McLean, Wayne and Catron, Justices. This says, the Chief Justice, makes the act of Congress consistent with the principles of justice, and interprets it according to the natural meaning of the words; and it is too plain for argument, the proceedings in the Supreme Court of Vermont upon the habeas corpus is a "suit." A right claimed by the prisoner was *litigated between him and the Governor and the sheriff of the county* in a court of justice. 14 Pet. 566.

Then as to the effect of the process acts.

1789.	1 Stats. 78.
1792.	1 Stats., 93, 276.
1828.	2 Stats., 281.
1824.	2 Stats., 62.

In many of the States a suit may be instituted by attachment of property when the defendant resides out of the State. The same code of practice of Louisiana which provides for executory process legitimates this proceeding. Arts. 240, 254.

In Tolond v. Sprague it was held that although these acts have adopted the forms of writs and modes of process of the several States, they can have no effect when they contravene the legislation of Congress.

State laws can confer no jurisdiction on the court by use of State process to reach either persons or property which it could not reach within the meaning of the law creating it. (p. 328.)

The acts of Congress adopting State process, adopt the form and modes of process only so far as the persons are rightfully within the reach of such process, and did not

intend to enlarge the sphere of the jurisdiction of the Circuit Courts. (330.)

Even in the case of a person amenable to process in personam, an attachment against his property cannot be issued except as a part or together with process to be served on his person. 12 Pet., 330.

See also Pomroy v. R. R. Co., 4 Blatch. 120.
Sadler v. Fallon, 2 Curtis, 580.

The act of 1824 provides that the modes of proceeding in civil causes, in the courts of United States, established in Louisiana shall be conformable to the laws directing the mode of practice in the District Courts of said State. But the Judge of the United States court is authorized to make such provisions as may be necessary to adapt the said mode of procedure to the organization of such court of the United States, and to avoid any discrepancy between such State laws and the laws of the United States.

Under this act the question was brought to this court whether the practice of the State Court, which requires the evidence to be taken down by the clerk was not obligatory on the Circuit Court.

It was argued by Livingston and Webster that the act of 1824 was obligatory.

That the proceedings in Louisiana are by petition and answer, and that such proceedings are not to be governed by the principles of the common law.

That the 22d section of the judiciary act which prohibits a reversal of a judgment for error in fact, and the constitutional amendment which forbids a fact once tried by a jury from being otherwise re-examined than according to the rules of the common law, do not apply to Louisiana, where the rules of the common law are not known or permitted.

The decision of the court rejects these propositions and holds that it was not the intention of the act of 1824 to give an absolute and imperative force to the modes of proceeding in the State Courts so as to alter the jurisdiction of the court in cases tried by a jury.

That the term "common law" used in the amendment, which requires trial by jury—means not merely suits which the common law recognized among its settled proceedings, but suits in which *legal* rights were to be determined in contradistinction to those in which *equitable* rights were to be administered.

That the amendment by which trial by jury is secured, embraces *all suits* which are not of equity or admiralty jurisdiction, *whatever may be the peculiar form which they may assume to settle legal rights.* 3 Pet., 434.

In the case of Livingston v. Story this act of 1824, was again urged as showing that the District Court of the United States had no equity jurisdiction, because no such jurisdiction existed under the State practice.

Mr. Clay and Mr. Porter admitted that the judge had the power to modify the practice, but insisted that until he does modify it, the State practice is imperative for, were it otherwise, the proviso would be the rule, and the enacting clause the exception.

The Court, however, held that the courts of the United States in Louisiana possessed the same equity jurisdiction, though unknown to the practice of that State, as those courts possessed in other States. 9 Pet., 652.

The distinction between law and equity in the enforcement of rights is as well established in the Federal courts sitting in Louisiana as in other States. The acts of Con-

gress have distinguished between remedies at common law and in equity, and no State regulation can be permitted to confound them.

Robinson v. Caldwell, 3 Wheat., 212.

Insurance Co. v. Tweed, 7 Wall., 50.

Whether the executory process can be used by the Federal courts may be tested by the inquiry whether the remedies given by that practice can be applied by those courts.

It will be remembered that if this process had been sued out in the local court, an immediate appeal could have been made to the Supreme Court of the State. Now, this court has held that no appeal or writ of error would lie to such a proceeding in the Circuit Court of the United States.

Levy v. Fitzpatrick, 15 Pet., 171.

This is fatal to the use of this process in the Federal courts.

In the case of Parks v. Turner two errors were assigned.

1. That the verdict was not sufficient to authorize a judgment.

2. That the Court gave no reason for its judgment.

It was admitted that both these objections were fatal under the Louisiana practice.

But these objections were overruled. The Supreme Court of the State, on an appeal where these errors were alleged, while reversing the judgment, would have themselves rendered a judgment for the full amount of the debt.

For this reason, this court say that as to the first objection they cannot adopt the practice of the Supreme Court of the State. And as the *whole practice of Louisiana*

cannot be adopted, the Circuit Court is not bound by it. The qualified adoption of the practice of Louisiana by the act of 1824 was not intended to carry it to this extent.

12 How., 43.

The executory process in this case has been used against a corporation whose bonds are held in many States and also in Europe.

Under the laws of the State this public corporation could not have executed a mortgage but by special legislation. The act of 20th March, 1856, confers the power to "issue bonds secured by mortgage."

The civil code provides, that in ordinary mortgages the debtor is to be proceeded against via ordinaria, to wit, by citation, and where the title imports a confession of judgment by executory process.

Art. 3361.

Was it the intention of the legislature to authorize the execution of such a mortgage as would place its whole business and assets at the mercy of a single creditor?

Whether this be so or no, we maintain that the case made by petitioner praying for a seizure and sale of the mortgaged property, was under the circumstances enforceable only on the equity side of the Court.

We maintain further that the executory process is inconsistent with the organization of the Federal Courts.

First. Because at no stage of the proceeding is the party entitled to demand a trial by jury.

Second. Because the remedies allowed by the State practice cannot be enforced in the Courts of the United States.

Third. Because the proceedings require no citation to the debtor.

* There is a 2nd Mort. on same premises p. 9 The Mort. conveys the future profits of the road and is in excess of the authority conferred

In all the decisions arising on mandamus, prohibition or habeas corpus in which the character of a "suit" has been established, the conclusion has been based on the ground that there was a litigation between parties fully represented in the controversy.

This particular process has been before the Court in two cases:—The first of these, Levy v. Fitzpatrick, already cited. In determining that the writ of error would not lie from such a proceeding, the Court cites the provisions of the act of 1789, and declares that the construction given to these provisions is, that *no judgment* can be rendered by a Circuit Court against any defendant who has not been served with process issued against *his person*.

The report states that the matter decided by the Court was neither assigned for error, nor argued by counsel.

The other case, is that of Erwin v. Lowry, which was a writ of error to the Supreme Court of the State under the 25 section.

The action was commenced in the District Court of the State, by Lowry, curator of the estate of McNeill against Erwin, charging him with having obtained possession of the property by collusion and fraud.

Erwin set up his title as a bona fide purchaser at public auction, from the Marshal of the United States, who sold "under a judgment and on a writ of seizure and sale," issued from the Circuit Court United States. That he had paid the purchase-money, been put in possession, and made valuable improvements; that McNeill had joined in the appointment of appraisers, was present at the sale, and directed the mode of conducting it. The District Court gave judgment for Lowry, and on appeal to the Supreme Court this judgment was affirmed, the Court holding that the Circuit Court of the United States had no jurisdiction inasmuch as McNeill against whom

the process issued was not in fact, as was alleged a citizen of Louisiana; that the proceedings of the Marshal had not been conformable to law; and that the property in question when seized and sold was part of a succession in the Probate Court, and could not be seized on an execution issued from another Court.

This court held, that as the record stated, McNeill to be a citizen of Louisiana, this could not be called in question in a collateral action, so as to defeat the purchasers title.

That jurisdiction was not defeated by the fact that the property was in the course of administration.

That admitting the insufficient notice to McNeill, would have avoided the acts of the Marshal, yet this had been cured by McNeill's action in the premises.

That the purchaser saw the debtor and the Marshal select the appraisers, and heard the debtor direct the Marshal how the sale should be conducted.

That the proceedings below partook more of the nature of a proceeding in equity than one at law, and though it is to be reviewed by writ of error, this does not change its character.

We admit that there are expressions in the opinion adverse to the views here presented, but the considerations now urged were not present to the mind of the court, and are not alluded to. The Supreme Court of the State whose decision was under review, assumed that such a jurisdiction existed and only challenged its exercise in the particular case.

The case now presented is that of a public corporation whose bonds are held by its creditors residing in many States and in foreign countries, and whose interests are hazarded without the opportunity of protecting them.

We therefore insist that as the corporation had no notice until the execution issued, it was entitled to be heard and that the "audita querela" was the proper remedy.

Brooks v. Hunt, 17 John, 484.
Boyle v. Zacharie, 6 Pet., 656.
Lovejoy v. Webster, 10 Mass., 103.
Comyn's Digest.

On the second point which relates to the *regularity* of the proceedings, (admitting the jurisdiction to be maintainable,) we insist on the rule well established by the decisions that "when a party resorts to the summary and severe remedies allowed by law, a strict compliance of every formality is required."

We refer on this head to the Brief filed by Mr. Campbell.

P. PHILLIPS,
Of Counsel for Appellant.

March, 1871.

Kiehl 740 - 747 - 757

SUPREME COURT OF THE UNITED STATES.

No. 321.—December Term, 1869.

The New Orleans, Opelousas, and Great Western Railroad Company, Plaintiff in Error, vs. Charles Morgan.	In error to the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

Mr. Justice CLIFFORD delivered the opinion of the Court.

Two principal causes are assigned in support of the motion to dismiss the writ of error:

1. That the record contains no bill of exceptions nor any agreed statement of facts or any special verdict, demurrer to a material pleading, or demurrer to evidence.

2. That the supposed judgment exhibited in the record is not a final judgment.

Express jurisdiction is conferred upon this court by the twenty-second section of the judiciary act to re-examine, upon writ of error, and reverse or affirm final judgments in civil actions rendered in a circuit court, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, whether the same was brought there by original process or was removed there from courts of the several states, or from a district court.—(1 Stat. at Large, 84.)

Such a writ of error, when issued to a circuit court, removes the whole record into this court, and if all the proceedings in the suit were correct, it follows, if not from the very words of the section, certainly from the necessary construction of the same, that the judgment must be affirmed. —(Taylor v. Moreton, 2 Bl., 484.)

Error may be shown in such a case by a bill of exceptions or by a demurrer to the declaration, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting it is no cause for dismissing the suit, because the writ of error issued to a circuit court under that section brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record the prevailing party in the circuit court is entitled to an affirmance of the judgment.—(Minor & al. v. Tillotson, 1 How., 287. Stevens v. Gladding, 19 How., 64.)

Cases brought here by writ of error to a state court, issued under the twenty-fifth section of the judiciary act, stand upon a very different footing, as in such a case it must appear on the face of the record, in express terms or by necessary implication, that some one, at least, of the questions described in that section did arise in the state court, and that the question so appearing in the record was decided in the state court, as required in that section; and if it does not so appear in the record, then this court has no jurisdiction of the case, and in that event the writ of error must be dismissed, as this court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the state court.—(Suydam v. Williamson, 20 How., 440. Taylor v. Moreton, 2 Bl., 483. 1 Stat. at Large, 85.)

Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions,—as where proper testimony is rejected or where improper testimony is admitted,—but there may be error in the proceedings of a subordinate court apparent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict,—as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law and they have been adopted and applied in this court in repeated cases.—(Slacum v. Pomeroy, 6 Cran., 221. Garland v. Davis, 4 How., 131. Bennet v. Butterworth, 11 How., 669. Cohens v. Virginia, 6 Wheat., 433. Suydam v. Williamson, 20 How., 433.)

Whatever the error may be and in whatever stage of the cause it may have occured it must appear in the record or proceedings, as before ex-

SUPREME COURT OF THE UNITED STATES.

No. 321.—December Term, 1869.

The New Orleans, Opelousas, and Great Western Railroad Company, Plaintiff in Error, vs. Charles Morgan.	In error to the Circuit Court of the United States for the District of Louisiana.

On motion to dismiss.

Mr. Justice CLIFFORD delivered the opinion of the Court.

Two principal causes are assigned in support of the motion to dismiss the writ of error:

1. That the record contains no bill of exceptions nor any agreed statement of facts or any special verdict, demurrer to a material pleading, or demurrer to evidence.

2. That the supposed judgment exhibited in the record is not a final judgment.

Express jurisdiction is conferred upon this court by the twenty-second section of the judiciary act to re-examine, upon writ of error, and reverse or affirm final judgments in civil actions rendered in a circuit court, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, whether the same was brought there by original process or was removed there from courts of the several states, or from a district court.—(1 Stat. at Large, 84.)

Such a writ of error, when issued to a circuit court, removes the whole record into this court, and if all the proceedings in the suit were correct, it follows, if not from the very words of the section, certainly from the necessary construction of the same, that the judgment must be affirmed. —(Taylor v. Moreton, 2 Bl., 484.)

Error may be shown in such a case by a bill of exceptions or by a demurrer to the declaration, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting it is no cause for dismissing the suit, because the writ of error issued to a circuit court under that section brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record the prevailing party in the circuit court is entitled to an affirmance of the judgment.—(Minor & al. v. Tillotson, 1 How., 287. Stevens v. Gladding, 19 How., 64.)

Cases brought here by writ of error to a state court, issued under the twenty-fifth section of the judiciary act, stand upon a very different footing, as in such a case it must appear on the face of the record, in express terms or by necessary implication, that some one, at least, of the questions described in that section did arise in the state court, and that the question so appearing in the record was decided in the state court, as required in that section; and if it does not so appear in the record, then this court has no jurisdiction of the case, and in that event the writ of error must be dismissed, as this court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the state court.—(Suydam v. Williamson, 20 How., 440. Taylor v. Moreton, 2 Bl., 483. 1 Stat. at Large, 85.)

Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions,—as where proper testimony is rejected or where improper testimony is admitted,—but there may be error in the proceedings of a subordinate court apparent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict,—as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law and they have been adopted and applied in this court in repeated cases.—(Slacum v. Pomeroy, 6 Cran., 221. Garland v. Davis, 4 How., 131. Bennet v. Butterworth, 11 How., 669. Cohens v. Virginia, 6 Wheat., 433. Suydam v. Williamson, 20 How., 433.)

Whatever the error may be and in whatever stage of the cause it may have occured it must appear in the record or proceedings, as before ex-

plained, or be shown by a bill of exceptions, agreed statement of facts, demurrer, or special verdict.—(1 Chitt. on Plea., 431. 1 Tidd Prac., 586. U. S. v. Eliason, 16 Pet., 291.)

Two thousand bonds for the sum of one thousand dollars each were, on the first of April, 1859, issued by the plaintiffs in error, falling due in thirty years, with interest at eight per cent. payable semi annually in coupons for the proper amount. Their road was completed at that time from Algiers, opposite the city of New Orleans, to Berwick Bay, a distance of eighty miles, and they mortgaged the same, together with the road-bed of the main track and branches and the depots and the lands appertaining thereto, to secure the payment of the bonds. On the twenty-third of February, 1869, Charles Morgan filed his petition in the circuit court, averring that he was the holder of a certain number of these bonds and of a large number of coupons which were past due, and an order was made on that petition, on the thirtieth of March following, that the corporation plaintiffs, on three days' notice, pay to the petitioner, the defendant in error, [illegible] hundred and sixteen thousand dollars, and the cost of the proceedings, and that in default of such payment the mortgaged property might be seized and sold according to law for the whole of the debt secured by the mortgage. Payment, as thus summarily ordered, was not made, and thereupon a writ of seizure was issued by the court and the whole of the mortgaged property was seized by the marshal and sold, and the petitioner became the purchaser of the same at the sale.

It is contended by the plaintiffs that the process and all the proceedings in the circuit court were irregular and void and that the same should be set aside, but the court will not determine that question at this stage of the controversy, because it is clear that if the views of the plaintiffs are correct, and the judgment is a final one, it must be reversed. Questions of reversal or affirmance appertain to the merits of the controversy and will not be determined upon a motion to dismiss.

But the defendant insists that the judgment is not a final one and that the writ of error should be dismissed on that ground.

On the first of June, 1869, the plaintiffs for the first time appeared on the law side of the circuit court, and filed their petition in the nature of an audita querela, averring that the executory process could not be legally ordered without notice; that the order was made without notice and without proper evidence and parties; that the subject of the suit was only cognizable in equity, and prayed that the validity of said proceedings may be examined, and that they be restrained and suspended by a writ until a final order herein.

Hearing was had on the petition and the court having duly considered the petition and exhibits submitted by the petitioner in this cause, and "being satisfied that the prayer thereof cannot be granted, it is ordered and decreed that the said petition be dismissed with costs."

Judgment rendered June 14th, 1869. Judgment signed June 18th, 1869.

The forms of verdicts and judgments, it is true, are not controlled, even in Louisiana, by the state law, but there must be some variation from the form of a judgment as at common law to render it appropriate to the form of the process adopted in that circuit. Common law suits as well as suits in equity are commenced in that court by petition and the judgment in this case is in a form not unusual in that court. It is called a judgment in the record and treated as such by the court and the parties, and in our opinion the writ of error ought not to be dismissed for either of the reasons assigned in the motion.

Motion denied.

Supreme Court of United States.

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO.

VERSUS

CHARLES MORGAN.

ERROR TO CIRCUIT COURT U. S., LOUISIANA.

J. A. CAMPBELL and
M. M. COHEN,
For Plaintiff in Error.

CHRISTIAN & HYATT, PRINT. 28 CAMP ST., N. O.

Supreme Court of United States.

NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD CO.

VERSUS

CHARLES MORGAN.

ERROR TO CIRCUIT COURT U. S., LOUISIANA.

Charles Morgan placed on file in the Circuit Court a petition for executory process, in February, 1869.

This petition recites the incorporation of the railroad company in 1853; an authority given to the company by the Legislature in 1856, to raise money by issuing of bonds therefor, and to secure the same by mortgage on the road and its equipments; and the proposed execution and sale of two thousand bonds (secured by mortgage) in April, 1859, having thirty years to run, with coupons for the interest attached. The petition further avers, that the plaintiff, Morgan, holds eight hundred and forty bonds, having three thousand six hundred and twenty-five coupons attached which had not been paid. He further avers, that he holds four thousand two hundred and

ninety-six coupons which had been detached from the bonds and are due, and that he files his bonds and coupons aforesaid as evidence of his debt of $316,840.

The petition further represents, that the petitioner (Morgan) is not the only creditor of unpaid coupons, but that this debt is $606,600. This information is derived from a report published in January, 1869, and a portion of that report is copied and filed as certified. The prayer of the petition is for executory process to issue; that three days' notice be given to the petitioners to pay the debt of Morgan, and in default of this payment within three days that the property may be seized and sold for the sum of $606,600, the unpaid debt for cash, and the costs of the proceedings, and that a credit be given on the remainder to correspond with the credit on the bonds remaining unpaid.

No proceeding was had on this petition till the 30th of March, 1869. At this date, Judge Durell presiding, granted an order to correspond with the prayer of the petition as above stated. R. p. 5, fo. 17.

The evidence on which this order was made was filed with the petition. The evidence consists of the resolution of the company providing for the issue of the bonds, the mortgage of the company, exhibit B, an exhibit of bonds and coupons of Morgan, and of the detached coupons, and an extract from the report of the Board of Directors, in January, 1869. On the 30th March, 1869, process was issued and orders that on default of the payment of $316,840, after *legal demand*, the whole property

described in the mortgage should be seized and sold. The price to be collected in cash, $606,600 and costs, and the remainder upon credit. R. p. 11, f. s. 35–36.

The marshal served notice of demand the 31st March, 1869. He returns his seizure on the 5th April, 1869, and his sale on the 25th May, 1869. R. 11, 12, 13 and 14.

On the 20th April, 1869, a supplemental petition was filed in which the plaintiff, Morgan, alleged that the debt had been increased by a default on the bonds for the interest of April. No bonds nor coupons were filed with this supplemental petition.

But the amount of $80,000 seems to have been calculated upon the supposition that there were two thousand bonds outstanding, and that no interest had been paid; whereas, the evidence from the report filed with the petition in March, shows there were only one thousand nine hundred and eighty-seven bonds outstanding. Referring to the advertisements of the marshal and to his return, (R. pp. 11–14, fos. 37, 45,) it will be seen that the sale was for $686,600 in cash, corresponding to this supplemental petition, which was allowed *ex parte*. No demand was made for this debt of $80,000, as was done under the original petition, nor any notice of the filing of the petition or increase of the debt.

The corporation was not cited on the petition. The only notice of its issue consists in the demand for payment of the sum stated to be due to Morgan in that original petition.

The proceedings of the defendants are as follows: on the 1st day of June, 1869, five days after the purchase, they asked of the court to award a writ to the said Morgan, expressing a willingness to hear the objections to the proceeding of executory process and the orders on the same, and that the writ might be superceded. R. 17, p. 16. In this petition it appears that the corporation had filed a bill to enjoin this sale, on the chancery side of the Circuit Court, which the court did not act on till the 24th May, the day before the sale, and then refused the injunction.

This petition sets forth at large the objections to the process. This petition was opposed by Morgan by an answer to the same filed the 7th June, 1869. R. 21.

On the 1st June, 1869, Morgan moved the court that the defendants should furnish the bonds outstanding, the debt due by the company, so that the amount bid at the sale might be distributed. R. p. 21, fo. 67.

The defendants again appeared and set forth their objections to the sale, their proceeding by bill, the long withholding of any order upon that bill by the judge and prayed that the sale be annulled.

The judgment of the court in refusing the *audita querela* will be found R. p. 22, fo. 72.

The judgment of the court overruling the objections to the sale and to any further proceeding in the cause. This judgment is at p. 24, fo. 79

To recapitulate, the plaintiff obtained his order 30th March, 1869, and notice was given the 31st. The defend-

ant filed a bill the 5th April, 1869, to enjoin it. R. 27. The motion was argued the 27th April, 1869. The judge ordered briefs to be filed in ten days. He held the case up till the 24th May, 1869, then for reasons orally assigned he refused it. *Next day was the sale day* and the property was sold, *Morgan* being the purchaser.

The defendants then appeared in the law court and asked for an *audita querela*; also opposed the distribution of the proceeds. Being denied all relief on the 30th of June they sued out a writ of error to this court.

The bill in chancery and the proceedings on the motion for injunction appear in the Record, only to show the history of the case. They were exhibits to the petition for the *audita querela*, and to avoid any implication of neglect or inattention

Of course, we do not suppose that the judgment on that motion is a matter for a review, and we only allude to them as papers on file in the cause, and to show what had been done and said in the case.

The review we contemplate is of the record and proceedings on the petition for executory process and the judgments in the *law court*, under which this great property has been conveyed from the corporation to Morgan, the plaintiff.

We also ask the review of the orders refusing our applications for redress.

The first assignment of error we make is that the order granted on the 30th March, 1869, upon the original petition (R. p. 5, fo. 17,) and the order granted on the

supplemental petition, (R. p. 16. fo. 51,) and the seizure and sale consequent thereupon could not be validly made without a citation to the defendant and a call for an answer under the II § of the judiciary act.

We admit that the Code of Practice of Louisiana does not require citation.

Aillett vs. Henry, 2 Ann. R. 145.

Dupuy vs. Bemis, 2 Ann. 509; 2 Ann. 569.

But the act adopting the Code of Practice of Louisiana adopts it with a reservation of the practice adopted by the acts of Congress of the United States. 4 Stat. 62. The judiciary act requires citation or the service of process. Day vs. Chaffee, 20 How. 216.

We admit that the mortgage in this case is an authentic act and is made to fulfill the requisitions of the Code of Practice, art. 733. But the jurisprudence of Louisiana requires that all of the debt claimed shall be proved by *authentic* evidence. That there is no authentic evidence of the genuineness of the four thousand two hundred and ninety-six detached coupons produced by Morgan, and none of the debt of any portion of the sum of $289,760 which Morgan did not hold, making up the sum of $606,600 for which the writ issued; and that there was no authentic evidence filed with the supplemental petition and none was on file in the cause, unless it be coupons due in April, 1869, on the eight hundred and forty bonds filed, amounting to $33,600 at forty dollars each.

The identity of the notes with those secured by the mortgage must appear in the Record. Where any fact is

00. 4 Blatch 120 2 Curtis 477
h 628. 4 Peters 466
Wild 2 Cromp & Jervis 558
rein

to be proved *aliunde* the process *cannot* issue.

Chambliss vs. Atchison, 2 Ann. 488.

An indorsee of a mortgage note, whose indorsement is not verified by authentic act, is not entitled to an order on affidavit that the indorsement is genuine.

10 Martin, 223.

6 Martin, N. S. 531.

The holder of a mortgage note, payable to bearer, cannot have process without authentic evidence of the transfer of the note and mortgage.

4 Louisiana R. 321.

11 Louisiana, 52. 17 Louis Ann 58

2 Rob. 303; 9 Ann. 310.

Authentic evidence, under the Code of Louisiana, is defined in Article 2231 of the Civil Code; C. P. 733.

We admit that the production of the bonds with the coupons attached is authentic evidence upon which, in ordinary cases, process might issue.

The detached coupons stand differently. The bonds are marked "ne varieteur," and that mark authenticates the bonds and coupons.

But the detached coupons have no mark on them; they contain merely a promise to pay forty dollars at a particular day as interest on a bond numbered. The coupon makes no reference to the mortgage, nor to the bond as issued under a mortgage or as secured by it. An exact copy is as follows:

"The New Orleans, Opelousas and Great Western Railroad Company will pay to the bearer on the first day

2 Ladd v Ellis 170

of April,....Eight Pounds Five Shillings Sterling, if payable in London, or Forty Dollars, if payable in New Orleans or New York, being the interest to that date on their Bond No.——."

Under the ordinary rules of evidence, proof of the signature would have to be made to bind the company. 2 Rob. 303; 10 An. 275; 6 An. 477.

But of the debt of $287.760 there is no evidence at all. The bonds are not produced, nor are the coupons. The evidence relied on is a certified statement or report of a debt in the aggregate, without names of the creditors or a specification of the date of the coupons, and there is no connection shown between the statement and the bonds.

Besides, it was an acknowledgment made two months before the application in a general report. But the law requires the production of the authentic evidence of an existing debt.

The mortgage does not secure a debt, but bonds, to be subsequently disposed of in the market from time to time, and the debt can only be proved by the bonds and coupons with a notarial authentication.

This is fatal to this proceeding. The proceedings being *ex parte*, the creditor must, at his peril, look to the accuracy of his demand and the decree; when for more than is due, however small the error, it must be reversed, and plaintiff condemned to pay the costs. Cumming vs. Archinard, 1 An. 279.

The practice in Louisiana allows a party to appeal from the order of seizure and sale after the notice is given. This is his only mode of redress against the order. But the Supreme Court of the United States rejected that practice because the order was not a *final* judgment. Levy vs. Fitzpatrick, 15 Peters, 115. ✱

The consequence of this is that a seizure must take place if this process be allowed in the courts of the United States. A railroad, costing millions, in which the city of New Orleans had contributed $1,500,000 and the State of Louisiana $1,200,000, in this case went, in five days, under an ex parte order, into the hands of the marshal. The Louisiana view of the notice of three days given by the marshal, is to enable the debtor to appeal. It is in the nature of a notice of judgment. Upon the appeal, the validity of the order, and whether it is properly supported, are the only questions. 1 Rob. 295; 9 Rob. 8; 14 An. 105.

If the order be valid and there be no appeal, the only mode to deal with it is to restrain the process by injunction, for the reasons set forth in C. P. art. 739. Under this form of proceeding the trial is summary. C. P. 740-741, that is, without a jury, C. P. 756-757. #

We tried to obtain an injunction, but the court dealt with it according to chancery forms of procedure; that is, after notice and argument, and the seizure was meanwhile made. To have applied to the judge for a writ of *audita querela* and *supercedeas*, would have been unavailing. The three days of grace, as they are called, between notice

✱ The judgment is final that orders a sale of property and directs possession
2 How 207 19 How 288

The courts of the U. S are bound to allow service and grant jury trials. This form of proceeding provides for neither but forbids both. How can it be used
2 How 608

and seizure, (1 Rob. 295,) were expended in the delays incident to and unavoidable under the conditions of the case. These common law methods were afterwards resorted to and proved abortive.

The bonds of railroad companies circulate in Europe and all of the States of the Union. They form permanent investments for minors and married women, and yet we see how a railroad can be sold in a few weeks at the suit of a single creditor and in the absence of all others. If these sections of the Code of Practice be adopted in the federal courts, there must be important changes to conform to the laws of the United States, made to prevent injustice and oppression. Citation should issue and writs of error should be granted from orders of seizure. This would be to abolish it, and to substitute the *via ordinaria* for the *via executiva*, which is spoken of in these decisions.

The *audita querela* is applicable to such a proceeding. We had no appeal from this order. An *audita querela* lies for a man in execution or in danger of it, when he has matter of fact or in writing to avoid such execution and no other means to take advantage of it. And it will lie as well after as before execution. Fraud or abuse of legal process constitute a ground for it. It is in the nature of a bill of equity, in which the equitable rights of the parties will be regarded. Comyn's Dig. *(audita querela.)* 2 Saunders's Rep. 148.

The facts that the executory process issued for a debt not supported by *authentic evidence*, and for a debt in

which the creditors did not demand the process or appear in the court to obtain its aid, nor were parties to the Record, are facts of fraud and of abuse of the process of the court. This argument is supported by the irregularity of the proceedings on the supplemental petition. No evidence was adduced to the court of any failure to pay the April interest. No evidence of the coupons of April were exhibited, unless, perhaps, those attached to the bonds filed, and a round sum of $80,000 was calculated as the April interest, and a summary order made for their collection in cash.

The application for relief was made while the whole subject was still under the control of the court. The wrong doer was the purchaser. The price was still in the court. This is shown by an application made by the plaintiff to ascertain who the creditors were, and what bonds had been issued and were outstanding, so that they might be paid. Here is a case issued, or purporting to be issued, upon a demand supported by *authentic evidence* filed by the creditor to support his claim; an order of seizure made *ex parte;* a sale of an enterprise sanctioned by and contributed to, to the extent of millions by the State and the city; and, nevertheless, after the sale an inquiry is set on foot to ascertain what debt exists, and what memoranda has the debtor to show of its magnitude and the evidence of it.

Morgan shows that he did not represent those interested in the mortgage, and that he did not know what the debt really was.

His affidavits were of conclusions that he had drawn from the mortgage, and his own record shows that, while there were only 1987 bonds, he has collected the April interest upon 2000 bonds, apparently forgetful of what he had gathered from the report of the Directors in January, 1869.

The courts of the United States are courts of law or equity in regard to terrene and civil controversies. Much of the difference between these courts consists in the mode of procedure. The court of law commences with a plaintiff who has the entire legal right involved in the controversy against a defendant who represents the entire controversy as adverse to the claim. The judgment ascertains the plaintiff's right as declared, and the legal debt or injury sustained, as between the parties to the suit. In this case the mortgage was made to secure two thousand bonds and two coupons that might be detached for each year for thirty years, to whomsoever might be the holders of those securities. Each holder had the same claim for security.

One holder of a portion of the bonds and coupons comes into court to use for himself this social security, and in a *law court*, and prefers there a claim to have the security enforced without joining any other party, and on a conjectural representation of their claim. He makes no statement of the persons nor of their respective claims. He procures a sale on his *ex parte* application and becomes the purchaser, and then compels the debtor

to tell him who it is that claims and for whom the property was sold. The judgment ascertains no claim but Morgan's. The marshal is the officer who is to perform the most important duty of the judge. No trial by jury is provided for, or is allowed under this chapter of the Code of Practice

Is this such a controversy at law that a Circuit Court of the United States is appointed to determine in such a manner? Is an absent bondholder concluded by a sale made under such conditions? Can a bondholder be forced to take his dividend? The 11th section of the judiciary act strikes at the root judgments so rendered. It requires the service of process as the foundation of jurisdiction.

We are aware that in Erwin vs Lowery, 7 Howard, 172, it is said that the executory process might be used in the courts of the United States. The case came to the Supreme Court on a writ of error to the Supreme Court of the State, in which a title arising on a sale under such a process from the United States Court, was collaterally impeached, and in that case the defendant had notice of the sale, and assisted in making it by complying with the conditions to appoint appraisers and otherwise.

The Supreme Court decided that the Circuit Court of the United States had jurisdiction of the parties and the cause. But the fact is, that in such proceedings in Louisiana there is but one party. The notarial act imports a confession of judgment, and the notice of the

marshal was the same notice that, under the Code of Practice, was given in all cases of judgment as that Code originally stood. But our argument is that the 11th § of the judiciary act does require process in all cases to be served on a party, and cannot proceed *ex parte* or by seizure of estate; that the courts of the United States will not grant executions or executory process, which is the same as an execution on an *ex parte* statement. Whether such an allowance of an execution would be a nullity, is not the same question, whether it be error or irregular.

We do not deny that mortgages may be enforced at *law* under State practice, or in the courts of the United States under State practice. But such a mortgage as this—a mortgage to secure securities, separate, distinct and capable of being circulated among thousands of different parties, is not of this class. Morgan produces above seven thousand distinct obligations, and does not hold half of them. Every opinion of proper procedure is wounded by the appropriation by a single creditor of a social security in the manner in which this has been employed. It will open the door to fraud upon the rights of absent persons who hold such securities.

Pennick vs. Coe, 23 H. 117; 24 H. 257, 450.

"The writ of error opens the whole record. A writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution in a suit." Co. Litt. 288, b.

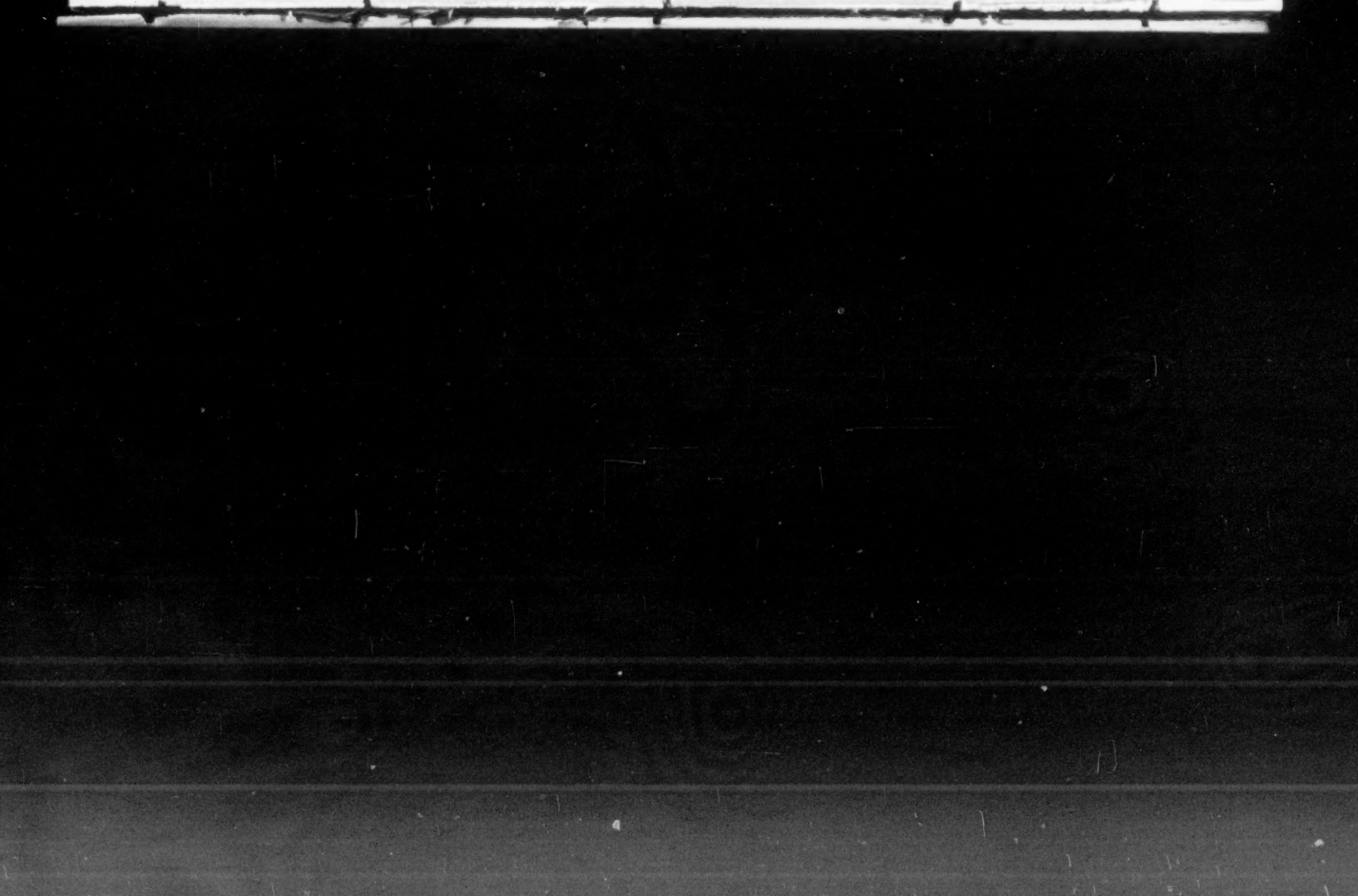
An award of an *audita querela* was proper. The case was a proper one for such a writ, and the judgment of the court was erroneous.

13 Gray's Mass., R. 1.

Gridley vs. Harraden, 14 Mass. 497.

Lee vs. Davis, 16 Ala. R. 516.

J. A. CAMPBELL and
M. M. COHEN,
For Plaintiff in Error.



Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 123.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES MORGAN.

BRIEF FOR CHARLES MORGAN,
DEFENDANT IN ERROR.

T. A. JENCKES,
MILES TAYLOR,
Of Counsel.

Judd & Detweiler, Prs.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 123.

THE NEW ORLEANS, OPELOUSAS, AND GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES MORGAN.

BRIEF FOR CHARLES MORGAN, DEFENDANT IN ERROR.

This case is before the court upon a writ of error allowed on the 30th of June, 1869, as will be seen by reference to pages 25 and 26 of the transcript on file. Upon an examination of that transcript it will be seen that there is embodied in it a great variety of proceedings belonging to two distinct and separate causes, instituted at different times in the circuit court of the United States for the district of Louisiana; one on the law side of the court, begun by petition for executory process, filed February 23, 1869, and No. 5788 of the docket, in which Chas. Morgan was plaintiff, and the New Orleans, Opelousas, and Great Western railroad was defendant, on which an order for executory process was entered on the 30th of March, 1869, (pp. 1 and 5, of the Record;) and one on the equity side of the court, begun by a bill of complaint in equity, to enjoin and restrain the proceeding by executory process, filed on the 5th of April, 1869, and No. 5817 of the docket, in which the New Orleans, Opelousas, and Great Western Railroad Company was plaintiff, and Charles Morgan was defendant, (pp. 26 to 39 of Record.)

Before the court will be in a condition to ascertain what questions are properly presented to it for decision by the record, it will be necessary to examine the transcript with care, and to observe what proceedings were had in the circuit court in the two cases referred to, respectively. To aid the court in that examination, we give the following recital of the circumstances surrounding them, and refer to the different pages of the record in which copies of the proceedings spoken of are to be found.

The New Orleans, Opelousas, and Great Western Railroad Company, on the 1st day of April, 1859, issued two thousand bonds, dated on that day, and redeemable on the 1st of April, 1889, for one thousand dollars each, bearing interest at the rate of eight per cent. per annum, payable semi-annually, in coupons of forty dollars, or eight pounds five shillings sterling each; and, "to secure the full, faithful, and punctual payment and redemption of each and all of the said bonds to any future holder or holders thereof, and to each and every one of them," "together with the interest accruing thereon," "as evidenced by the coupons attached to the said bonds, respectively, payable on the first days of April and October of each year," that company, by a public act, executed before a notary public and two witnesses, granted "a first mortgage lien or privilege" upon the property and franchises of the company, described in the public act, (pp. 6, 7, and 8 of Record.) It is unnecessary to detail the unhappy occurrences of the years from 1860 to 1865, which had the effect of interrupting the works entered upon by the company for the extension of its road, destroying the business which had been carried on over the completed portion, and dilapidating in a remarkable manner the tracks, bridges, buildings, rolling stock, and other property of the company. It is sufficient for our present purpose to say, that in consequence of these occurrences, and of the losses entailed by them on the company, it had altogether failed to pay the coupons of interest falling due subsequently to 1861 and 1862.

On the 10th of June, 1868, one of the creditors of the company, as the holder of a number of past due coupons of interest, instituted proceedings in the district court of the United

States for the district of Louisiana, in "the matter of the New Orleans, Opelousas, and Great Western Railroad Company," No. 700 of the docket of that court, and prayed that it might be decreed to be a bankrupt. The company took issue with the creditor upon the allegations contained in his petition, and the contestation which thus grew up was continued during the remainder of the year 1868, and up to the ——— day of March, 1869.

Mr. Charles Morgan, who was the holder of a large number of the bonds, and of a great amount of the past due interest coupons of the company, during the pendency of the proceedings in the United States district court, on the ——— day of November, 1868, instituted an action to enforce his rights against the New Orleans, Opelousas, and Great Western Railroad Company, by the seizure and sale of the property mortgaged to secure the payment of the bonds and coupons of interest held by him. After the institution of his action, and before the sheriff made a seizure of the mortgaged property, an injunction was issued out of the United States district court, on the 23d of November, 1867, to restrain Charles Morgan and the sheriff of the parish of Orleans from taking possession of any property belonging to the company, or interfering with the same in any manner whatever, until further orders of the court.

On the ——— day of February, 1869, Charles Morgan discontinued his action in the sixth district court of the parish of Orleans; and on the 23d day of February, 1869, in the case No. 5788 of the docket, he applied to the circuit court of the United States for executory process against the New Orleans, Opelousas, and Great Western Railroad Company, under which, by the laws of Louisiana, the company was to be notified for three days to pay the amount due to petitioner on the past due interest coupons held by him; and, in default of payment, the property mortgaged was to be seized and sold, according to law, for the whole mortgaged debt, the amount due on all the interest coupons past due and outstanding and unpaid, and the costs of the proceedings, to be paid in cash, and the remainder of the mortgage debt payable on the 1st day of April, 1889,

when the bonds representing it were payable, with eight per cent. interest thereon, payable semi-annually, on the 1st day of April and the 1st day of October of each year, the terms of credit granted by the original contract to the New Orleans, Opelousas, and Great Western Railroad Company, in the public act of mortgage executed on the 1st of April, 1859.

Although the petition for executory process was filed in the circuit court on the 23d of February, 1869, the court took no action upon it until the 30th day of March following, because the proceedings in the district court of the United States to have the New Orleans, Opelousas, and Great Western Railroad Company decreed to be bankrupt was still pending in that court, and the injunction issued in it to restrain Charles Morgan from proceeding against the property of that company was still in force. On the —— day of March, 1869, however, there was a decree rendered in the United States district court dismissing the proceedings to put the company into bankruptcy, and on the 30th of March, following, the order was entered for executory process to issue against the New Orleans, Opelousas, and Great Western Railroad Company, (p. 1 and 9 Rec.)

The notice to the defendant in that case, to pay the amount then due to Charles Morgan into the hands of the marshal, within three days, was served upon the president of the company in person, at the office of the company, on the 31st of March, 1869, (p. 13 of Rec.) On the 5th of April, 1869, the property mortgaged was seized and taken possession of by the marshal under the process of the court; and on the same day defendant was notified of the seizure of the property mortgaged, and that the marshal would proceed to advertise, and sell it according to law, (p. 13 and 14, of Rec.)

On the day of the service of the notice of seizure, the New Orleans, Opelousas, and Great Western Railroad Company, the defendant in the case No. 5788, exhibited its bill of complaint, on the equity side of the circuit court in the case No. 5817 of the docket, against Charles Morgan, and prayed that he should be enjoined and restrained from proceeding with his executory process, &c., &c., (p. 27 to 30, of Rec.) In this bill in equity

the New Orleans, Opelousas, and Great Western Railroad Company set up various matters upon which they asked the interposition of the equity power of the court to enjoin the proceedings in No. 5788 under the executory process. Among the grounds set up was the following: 1st. That Charles Morgan had not produced the bonds of which he alleged himself to be the holder so that it could be seen if they bore the notarial mark of *Ne Varietur;* and that there was nothing to identify the coupons with the act of mortgage. 2d. That no bonds or coupons, other than those held by Mr. Morgan himself had been filed or exhibited, nor had the name of any holder been stated or suggested. 3d. That they had no other notice of the proceedings than the fact of the seizure and the proposed execution of the order. 4th. That the proper parties had not been made thereto. 5th. That the subject of the suit was only cognizable in equity.

Service of the subpœna issued in the cause was made upon Mr. Morgan in person on the 6th day of April, 1869, and a motion for an injunction, which had been made by the plaintiff on the day of filing the bill, was ordered to be heard on the 16th of April. On that day Charles Morgan, on motion, was permitted to file, in support of his opposition to granting the motion for an injunction, certain proof: 1st. Of the fact that the bonds and the interest coupons described in the petition filed in the case No. 5,788, had been placed in the possession of the court on the day when the petition was filed, (p. 36, 37, and 10, of Rec.) And 2d. That a notice to pay the amount due to the petitioner, into the hands of the marshal within three days after the service of the same had been served upon the New Orleans, Opelousas, and Great Western Railroad Company more than three days before seizure was made of the property, (p. 37, of Rec.) After this, the motion for an injunction was proceeded in, and it was taken up and heard on four several days, and on the 27th of April, 1869, it was submitted to the court, (p. 38, Rec;) and on the 24th of May, 1869, a final judgment was rendered in the cause, No. 5817 in which it was "ordered and decreed that the prayer for an injunction be denied," (p. 39, of Rec.)

The proceeding in the case No. 5817, was one in equity, and nothing in that case can be brought here for revision except by an appeal. No appeal in that case has been taken. The case itself, therefore, is not before the court, and what is found in the Record in relation to it is copied into the transcript because it is referred to in an anomalous petition filed by the New Orleans, Opelousas, and Great Western Railroad Company in the circuit court, on the 1st day of April, 1869, and which is contained on pages 16 and 17 of the transcript.

After the bill for an injunction was exhibited to restrain Charles Morgan from proceeding under the executory process granted him in the case No. 5788, under the instructions given by Mr. Morgan, the marshal, on the 15th day of April, 1869, when he advertised the property under seizure for sale, fixed the day of sale on the 25th day of May, 1869, thus giving forty-five days instead of thirty, as required by law, between the day of the first publication of the advertisement and the day for the sale. This was done partly to give time for the proper disposition of the application made for injunction to stay the sale, and partly to afford time for giving the amplest publicity to the fact that a sale of the railroad in question was about to be made.

The circuit court rendered its decision denying the injunction asked, on the 24th day of May, the day preceding that fixed for the sale, and the sale took place on the 25th of May, 1869, as will be seen by reference to the marshal's return contained in the Record, (pp. 11 and 12 of Rec.)

The proceeding in the case of "Charles Morgan *vs.* The New Orleans, Opelousas, and Great Western Railroad Company," No. 5788, was one at law, and the right of the defendant to remove it for the review of the questions at law presented in it, was perfect from the 30th day of March, 1869, when the order for executory process was entered up, (p. 5 of Rec.) A writ of error taken in the case by the defendant, according to law, within ten days after the service of the notice to pay had been made on the defendant, on the 31st day of March, 1869, would have operated as a *supersidias*. (Aubert *vs.* Robinson, 6 Rob., 465.) But no writ of error was then taken, and

it is at once obvious, that the order for executory process to issue was a final judgment, and that all of the subsequent proceedings to be had in the case, were nothing more than proceedings required to carry into execution that order or judgment.

As the motion for an injunction, made in the case in equity, No. 5817, had been denied, the proceedings requisite to carry into execution the order or judgment in the case went on. The mortgaged property was sold under the authority of the judgment, on the 25th day of May, 1869, as shown in the return of the marshal; and on the following day, the 26th of May, 1869, the marshal, in order to make a distribution of the price of the property sold under the mortgage, among the holders of the bonds and coupons of interest, in proportion to their respective rights under the mortgage, under the laws of Louisiana, published a notice in the newspapers of the city of New Orleans, in which he gave information of the sale which had been made, and called on all the holders of the bonds, issued by the New Orleans, Opelousas, and Great Western Railroad Company, and identified with the mortgage, and of the coupons of interest belonging to them respectively, to produce them, &c., so that he might be able to make a distribution of the proceeds of the sale among them, &c., (pp. 17 and 18 of Rec.)

The marshal also called on the New Orleans, Opelousas, and Great Western Railroad Company immediately after the sale, for a statement, to be made by the proper officer of the company, of the number of the bonds issued by the company, and now outstanding, and for a statement also of the coupons of interest belonging to those bonds which had been paid by the company, to aid him in the work of making a proper disposition of the proceeds of the sale of the property mortgaged to secure their payment. The company refused to furnish the marshal with the information asked for, and in consequence of that refusal Mr. Morgan, by his counsel, on the 1st of June, 1869, took a rule upon the company to show cause why the company should not furnish the marshal with the statements required, (pp. 18, 19, and 20 of Rec.) The company made an

answer to this rule which is of a most extraordinary character, and is in violation of all the rules of proceeding known under the laws of Louisiana, or, as far as we are informed, in any other State or country. (Pp. 23 and 24 of Rec.) On the 18th of June the rule came up for trial, and after hearing the answer, and the argument made thereon, the rule was made absolute, and the company was ordered to make the statements asked for. (P. 24 of Rec.)

On the 1st day of June, the same day that Charles Morgan took the rule upon the New Orleans, Opelousas, and Great Western Railroad Company to compel that company to furnish the statement just mentioned to the marshal, the company filed the petition, which is contained on pages 16, 17, and 18 of the Record. This petition is an anomaly in our practice, in whatever light it may be regarded. The property seized in the case No. 5788 had been sold on the 25th of May, 1869, nearly a week before this petition was filed, and was then in the possession of the purchaser. If it was the object of the petitioner to recover the property as being still the legal owner of it, on the ground that the title vested in the purchaser was defective, because of a failure on the part of the marshal to fulfill all the formalities required by law in making sales under execution, that could only be done by bringing a petitory action against the purchaser, in possession, in the ordinary manner, and citing him to answer the petition as in other cases. (C. of P., 43, 44, 690, C. C. 2598; Winn *vs.* Elgee, 6 Robinson's L. R., 100.) Here, however, no separate action was intended. And there was not only no citation of Charles Morgan to answer the petition, but there was no prayer contained in it for a citation to issue against him, so that any proceedings upon the petition as a separate action would have been mere nullities. (C. of P., 206.)

This petition, it will be seen by reference to the Record, (p. 16,) was entitled as making a part of the case of "Charles Morgan *vs.* The New Orleans, Opelousas, and Great Western Railroad Company," No. 5788 of the docket of the circuit court; and it complains of the proceedings in that case, and specially

mentions the proceedings in the case in equity, No. 5817 of the docket of the circuit court, and complains of the refusal of the court to grant the injunction asked for in that case, and then prays the court to consider the petition, and all the matters in 5788, "and also the application for injunction and the bill filed, and that the same may be held and taken as a part of this petition."

It is evident from reading this petition that it was intended to obstruct the proceedings then going on in the case No. 5788 in some manner. But how such a petition could be entertained and have any legal effect in the case 5788, under the laws regulating judicial proceedings in the State of Louisiana, or under the rules regulating proceedings in causes in equity, is not perceived. The proceeding was unauthorized under the laws of Louisiana, if the object in filing it was to obtain an injunction. (C. of P., 304, 738, 739, 740, 742.) And if the object was to obtain a rehearing of the motion made for an injunction, in the case No. 5817, it certainly was not the proper mode of accomplishing that object in the equity cause No. 5817, in which the motion for the injunction had been made.

But whatever might have been the object of this petition, it was proceeded on by the petitioner, by a motion to grant its prayer, which was entered in the case No. 5788 on the 1st of June, 1869, the day on which the petition was filed, (p. 18 of Rec.) Mr. Morgan made a written opposition to this motion on the 8th of June, 1869, (pp. 21 and 22 of Rec.,) and on the 14th of the same month the motion was denied, and it was ordered that the petition should be dismissed, (p. 22 of Rec.)

Before any inquiry into the merits of the case No. 5788 is gone into, as connected with the order or judgment for the issue of executory process against the New Orleans, Opelousas, and Great Western Railroad Company, it will be proper to ascertain, first, what judgment is now before the court for revision under the writ of error; and, second, whether that judgment can be reviewed upon that writ of error.

I. The judgment rendered on the 14th of June, 1869, upon

the motion made by the New Orleans, Opelousas, and Great Western Railroad Company to grant the prayer of the petition filed on the 1st of June, 1869, (pp. 16, 17, 18, and 22 of Rec.,) and that rendered on the 18th of June, 1869, upon the rule to compel that company to furnish the marshal with a statement of the number of bonds issued by the company and then outstanding, and of the number of the coupons of interest belonging to them which had been extinguished, (pp. 18, 19, and 20, and 23 and 24 of the Rec.,) were judgments rendered in the exercise of a sound discretion, upon mere interlocutory points connected with the process of execution. Such judgments are in no sense final judgments, and no writ of error can lie to them. (Boyle *vs.* Zacharie & Turner, 6 Peters' R., 656, 657; Amis *vs.* Smith, 16 Peters' R., 314.) The writ of error, then, in this case, is to the judgment of March 30, 1869, ordering executory process to issue as prayed for in the petition of Chas. Morgan, filed in the case No. 5788, on February 23, 1869.

II. "An appeal is a civil law process and removes a cause entirely, subjecting the fact as well as the law, to a review and retrial, but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." (Wiscart *vs.* Dauchy, 3 Dallas' R., 321.) The case of Charles Morgan *vs.* The New Orleans, Opelousas, and Great Western Railroad Company, No. 5788, is in effect a proceeding to obtain an execution upon a confession of judgment. Such a case is an action at law. Whether the court of the first instance ought or ought not to have granted the executory process prayed for by Charles Morgan in his petition, was a question submitted for the decision of the court, and which it was the duty of the court to decide upon the evidence submitted to it. In the case before the court, that question was decided in favor of Charles Morgan. And now that the case is brought here by writ of error, the court is called upon by the plaintiff in error to examine the judgment rendered by the circuit court and to decide upon its correctness. How is this to be done? The evidence which was acted upon below, is not before this court. The

writ of error could not bring it up. It is true that the nature of the action was such that there could not have been any special verdict, or a bill of exception to the ruling of the court when rendering judgment. But there was ample means, under the laws in force in Louisiana, for bringing up the facts in such a manner that the questions of law arising on them would have been before the court for revision. (C. of P., 602, 603.) And the plaintiff in error having failed to have an agreed statement of facts made in the case, or to have one made by the court, the judgment must be affirmed.

Parsons *vs.* Bedford, *et al.*, 3 Peters, 445.
Hyde & Gliess *vs.* Booraem & Co., 16 Peters, 176.
Minor *vs.* Tillottson, 2 Howard, 392.
New Orleans *vs.* Gaines, 22 Howard, 144.

But, if we are mistaken in this, we think an examination of the record will at once show that there is no error in the proceedings had in the case No. 5718 of the circuit court for the district of Louisisna, in which the writ of error is taken.

The New Orleans, Opelousas, and Great Western Railroad Company was incorporated by an act of the Legislature of Louisiana, approved April 22, 1853, (Acts of 1853, p. 115,) and by the act approved March 20, 1856, (Acts of 1856, p. 205,) any railroad company was authorized "to borrow from time to time such sums of money as might be required for the construction or repair of any railroad, and for this purpose" might "issue bonds or their obligations, secured by mortgage upon the franchises and all the property of said companies, and payable at such times and places as the president and directors" might "designate, with power to sell, pledge, or otherwise dispose of said bonds, on such terms as the president and directors" might deem expedient, &c.

That company availed itself of the right thus given it to borrow money, and issued two thousand bonds, dated on the 1st of April, 1859, for $1,000 each, payable on the 1st day of April, 1889, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, in coupons attached to the bonds,

and gave a first mortgage, by public act passed on the 1st day of April, 1859, before a notary public, and in the presence of two witnesses, &c., to secure the payment of the bonds and of the interest to accrue on them, on the property described in the act. And in this act it was expressly stipulated that, "to secure the faithful and punctual payment, and the redemption of each and all of the said bonds, to any future holder thereof, and to each and every one of them, when the same shall become due and payable, together with the interest accruing thereon, in the manner and at the times" "stipulated, as evidenced by the coupons attached to the said bonds, respectively, payable on the first days of April and October of each year, the New Orleans, Opelousas, and Great Western Railroad Company," did by their president "grant, in favor of Edmond J. Forstall, or bearer, as well as in favor of all and every person or persons whomsoever who may become the holder or holders of said bonds or coupons, or any of them, a first mortgage lien or privilege" upon the property described in the act. And the act was accepted by Edmond J. Forstall, "as well for himself as for all and every other person or persons who may hereafter become the purchaser or purchasers, assignee or assignees, holder or holders of the said bonds or coupons, or any number thereof, or any of them, together with all the rights, privileges, and benefits thereto belonging, or in anywise appertaining," (pp. 7 and 8 of Record.)

By the laws of Louisiana, this act gave existence to certain rights in favor of the holders of the bonds and coupons issued by the company, with reference to the property.

1st. It created a mortgage, or real right upon or in the property described in the act, in their favor, and affected it in such a manner that the owner could not sell, or alienate, or dispose of it in any way to the prejudice of their rights. (C. C., 3245, 3246, 3249, 3360.)

2d. It gave them a right when the debt to secure the payment of which the mortgage was granted, falls due and remains unpaid, to have the property mortgaged sold, according to law, to satisfy. (C. C., 3361.)

3d. As a mortgage is in it nature indivisible, and prevails over every part of the property subject to it, the mortgaged property must be sold to satisfy the whole debt, it was taken to secure, and not a part of it.

C. C. 3249, C. of P., 686.
Pepper *vs.* Dunlap, 16 L., 163.
Florence *vs.* The New Orleans Nav. Co., 1 R., 224.
Union Bank *vs.* Smith *et al.*, 10 R., 49.
Armor *vs.* Downes, 2 A., 242.
Dwight *vs.* Richard, 5 A., 365.

4th. Any of the holders of these bonds and coupons had the right to enforce the mortgage, and the holders of the other bonds and coupons were incompetent to arrest a sale of the mortgaged property. They could not interfere otherwise than to cause the proceeds of the sale to be brought into court for distribution. (City Bank of New Orleans *vs.* McIntire *et al*, 8 R., 467.) And

5th. The holders of different portions of the mortgage debt were entitled to payment *pro rata*. No difference as to right could grow out of difference in the time of maturity or transfer. (Adams *vs.* Lear, 3 A., 144.)

And by the laws of Louisiana the act in question also gave rise to certain rights in favor of the holders of the bonds and coupons representing the mortgage debt, as to the manner in which their mortgage rights might be enforced.

1st. The act imported a confession of judgment because it was passed before a notary public, in the presence of two witnesses, and the company declared or acknowledged the debt for which the privilege or mortgage was given. (C. of P., 733.)

2d. Under the stipulations contained in his favor in the act, any holder of a portion of the mortgage debt which was past due was authorized to proceed against the debtor, "by causing the property subject to the privilege or mortgage to be seized

and sold, on a simple petition, without a previous citation to the debtor," &c.

C. of P., 734, 735, 736, 745.
Tilghman *vs.* Dias, 12 M., 691.
Rowflet *vs.* Shephard, 7 N. T., 513.
McDonagh *vs.* Fost, 1 R., 295.

Charles Morgan, the plaintiff in the court below, and defendant in error, being the holder of a very large portion of the mortgage debt of the New Orleans, Opelousas, and Great Western Railroad Company, was desirous of availing himself of the rights vested in him by the laws of Louisiana, under the stipulations in his favor contained in the public act of mortgage, for the purpose of obtaining payment of the interest on the mortgage debt then due, and owing to him on past due coupons attached to bonds then held by him, and on coupons detached from other bonds, of which he was also the holder. Instead of proceeding in a State court, Mr. Morgan saw fit, as a citizen of New York, to go into the circuit court of the United States for the district of Louisiana to accomplish his object, the jurisdiction of which over the subject-matter was concurrent with that of the State courts, in consequence of the citizenship of the parties.

The petition presented by Mr. Morgan praying for executory process was in the usual form, and contained the proper allegations, (pp. 1 to 5 of Rec.) This petition was accompanied with authentic copies of the resolution of the board of directors of the New Orleans, Opelousas, and Great Western Railroad, for the issue of the 2,000 bonds, and of the public act passed before a notary public and two witnesses, in which it was declared that the 2,000 bonds had been issued, and in which the mortgage to secure their payment, and the payment of the interest to accrue on them was granted, and with 840 bonds issued by the New Orleans, Opelousas, and Great Western Railroad Company, marked "*Ne Varietur*," and countersigned by the notary to identify them with the act of mortgage to which 3,625 coupons of interest, then past due and unpaid, were

attached, and with 4,296 coupons of interest belonging to other bonds issued by that company and marked "*Ne Varietur*," and countersigned by the notary to identify them with the mortgage, and which bore the numbers of the bonds, (pp. 3 and 4, 5, 6 to 8, and 10 of Record,) and Exhibit D, brought up in the original, (see p. 15 of Rec.)

These copies, and the bonds, and the coupons attached to them, and the detached coupons belonging to other bonds and bearing their numbers, constituted authentic evidence, and upon their production the order for executory process to issue was properly granted.

1. The copy of the act of mortgage furnished authentic proof of the issuing of the 2,000 bonds, with sixty coupons of interest attached to each.

2. The paraph of the notary to the coupons of interest was not necessary to identify the detached coupons with the mortgage, so as to authorize executory process to issue upon them.

Babin *vs.* Winchester, 7 L., 468.

Pepper *vs.* Dunlap, 16 L., 163, 168, 169.

Charles Morgan, in his petition, set forth the amount which was due to him by the New Orleans, Opelousas, and Great Western Railroad Company under the mortgage, and asked that the company might be notified to pay that amount to him in three days after the service of the notice. If the payment of that amount had been made, Mr. Morgan's claim at the time would have been satisfied, and there would have been an end of the proceeding. But the payment not having been made by the company, the law required that the property mortgaged should be sold to satisfy the entire mortgage debt, and the proceeding then became a proceeding for the benefit of the other mortgage creditors of the company as well as Mr. Morgan. And the law, too, required that it should be sold on the terms stipulated in the mortgage, so that the amount of interest due at the time of sale should be payable in cash, and the remainder, on the terms of credit given in the contract of mortgage. What amount of interest was then due to the different mort-

gage creditors? Mr. Morgan had no other information than was given to the public by the report of the company made on the 25th of January, 1869, preceding. This he gave to the court, (p. 9 of Rec.,) and the court in ordering the sale directed that the price of the property sold should be payable, $606,600 and the amount of the costs, in cash, and the remainder, on the terms of credit specified in the act of mortgage. Before the seizure was actually made another portion of interest fell due under the mortgage. To this fact the attention of the court was called, and as the law required that in such a case the sale should be made to satisfy the entire mortgage debt, the court ordered that the amount of the cash payment to be made at the time of the sale should be augmented by the amount of interest which had fallen due on the mortgage debt, after the order for executory process was granted, (p. 15 of Rec.) At the sale made under the executory process the cash payment to be made was $686,600, viz: $606,600, the amount of interest due at the time the executory process was granted, and $80,000 the amount of the interest which had accrued upon the total amount of the mortgage debt as declared in the public act of mortgage. And this proceeding was regular and in strict conformity with law.

Aubert *vs.* Robinson, 6 R., 461, 462.

The foundation for proceedings by executory process is the service of notice to pay the amount due to the mortgage creditor who has recourse to it.

C. of P., 735, 736.

Andrews *vs.* City Bank of New Orleans, 5 A, 737.

In the present case that notice was served upon the president of the New Orleans, Opelousas, and Great Western railroad, in person, at the office of the company, in the city of New Orleans; (p. 13 of Rec.,) and after the delay given by law had expired, the seizure was made on the fifth day after the service of this notice.

The proceeding by executory process is a proceeding of the

civil law. But there is nothing in it which is repugnant to the principles of the common law. Under the common law the practice has always prevailed of entering up judgments against debtors upon warrants of attorney. When there is a confession by warrant of attorney for the whole cause of action under the common law, judgment may be entered up at once, and execution issue against all the property and effects of a defendant. (Bingham on Judgments, 3 Law Library, 15 to 19.) The only difference perceivable between the proceeding in Louisiana now under consideration, on a contract of mortgage, importing a confession of judgment, and that under a confession of judgment, where the common law prevails, is that in Louisiana the execution runs against certain property specially affected to satisfy the debt, and that under the judgment entered up by warrant of attorney the execution runs against all the property of the defendant.

The plaintiff in error contests the validity of the proceedings by executory process, in the case No. 5788 of the docket of the circuit court, chiefly on these grounds:

First. That the order granted upon the petition for executory process could not be validly made without a citation of the defendant in the usual course of judicial proceeding.

Second. That there was no authentic evidence of the genuineness of the 4296 detached coupons held by Morgan, and presented to the court; or of the existence of any indebtedness on the part of the company, to other persons other than Morgan, in the sum of $289,760, upon other coupons.

Third. That the holders of the other bonds and coupons of interest were not made parties to the proceeding; and,

Fourth. That the motions made by the plaintiff in error on the 1st of June and the 18th of June, 1869, after the sale of the mortgaged property (p. 18 and 23, of Rec.) were in the nature of applications in an *audita querela*, and that "an award of an *audita querela* was" then "proper."

I. It cannot be doubted that the proceedings in this case would have been regular and valid, and in all respects binding, if they had been carried on in one of the district courts of the parish of Orleans, in the State of Louisiana, in which the defendant below and plaintiff in error had its domicil. The plaintiff in error insists that they are not so, however, because they were carried on in a court of the United States, and that the proceeding, though it would have been valid in a State court in Louisiana, is null and void, because it is in violation of the 11th section of the Judiciary Act of 1789. Is this true?

The United States, in establishing its courts in the different States, had a right to prescribe the rules for the government of the proceedings in them; but it did not exercise that right, and establish a uniform system of practice and proceeding for their guidance. As the Federal and the State courts sitting in the different States were to administer the same laws, the Congress of the United States saw fit to declare, in the Process Act of 1789, "that until further provision was made, and except when by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, etc., etc., in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same." "And the forms and modes of proceeding in causes in equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law," etc. (1 U. S. Statutes at Large, 93.) This was a temporary act, and it was re-enacted in 1790 and 1791, and was permanently enacted in substance in 1792, (1 U. S. Statutes at Large, 275;) and its provisions regulated the proceedings or practice in the United States courts in all of the States until 1824.

But in 1824 the act (4 U. S. Statutes at Large, 62) entitled "An act to regulate the mode of practice in the courts of the United States for the district of Louisiana," was passed. This act declared "that the mode of proceeding in civil causes in the courts of the United States that are now or hereafter may be established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of

the said State: *Provided*, That the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the State courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exists, between such State laws and the laws of the United States;" and this act is still in force. So that, by act of Congress, "the laws directing the mode of practice in the district courts of" Louisiana have been adopted and made operative in such manner in the courts of the United States as to become part and parcel of the laws of the United States.

But this is not all. Though it was not necessary, and it would seem to be a work of supererogation, the circuit court of Louisiana has, by a rule, expressly adopted the provisions of the code of practice of that State, for the government of the proceedings carried on there on the law side of the circuit court.

The Supreme Court of the United States have settled the construction to be given to this act of 1824. "The descriptive terms," the court observes in the case of Livingston *vs.* Story, 9 Peters, 656, "here used, civil actions, are broad enough to embrace causes at law and in equity, and may be fairly construed, as used in contradistinction to criminal causes. There are no restrictive or explanatory words employed, limiting the terms to actions at law. They apply equally to cases in equity; and if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of 1824, and will govern the practice in the courts of the United States."

The courts of the United States, in Louisiana, as *in every other State*, are vested with equity powers. The Constitution of the United States has declared that the judicial powers of the United States "shall extend to all cases in law or equity," arising "under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," &c., &c., and the Supreme Court of the United States has, in a long series of decisions, constantly

maintained that, under the Constitution and laws of the United States, the chancery jurisdiction of the Federal courts is the same in all of the States, and that the rule of decision in equity causes is the same in all. But this fact can have no influence on the decision of the court in this case.

The right of mortgage is a legal right under the laws of Louisiana. The right to have the property subject to a mortgage sold to satisfy the mortgage debt, is a legal right given to a mortgage creditor by the very letter of express laws. The right to have an execution issue to enforce a sale of mortgaged property, where default is made in the payment of the mortgage debt, upon a confession of judgment in favor of the mortgage creditor, is one given by law. If the proceeding by executory process be a proceeding at law, it would seem certain that the circuit court of the United States, setting in Louisiana, must have authority to order it and to have it carried into effect in conformity "to the laws directing the mode of practice in the district courts of the said State," through the force and effect of the act of 1824, before referred to.

Clark *vs.* Sohier, 1 Woodbury and Minot.
Strachen *vs.* Clyburn, 3 McLean, 174.

From the nature of the "executory process," as established by the laws of Louisiana, cases growing out of the exercise of the right to it must be very rarely brought to the notice of the Supreme Court of the United States. There have been but four cases, so far as we know, in which the Supreme Court has had anything before it connected with that proceeding. In two of them (15 Peters, 171, and 6 H., 229) executory process had been sued out. In the case of Levy *vs.* Fitzpatrick (15 Peters) a writ of error was taken from the order granting it. In that case one of the defendants was out of the jurisdiction of the court, and the writ of error was sued out, it seems, before any notice had been given to the resident defendant. The court, in this opinion, recognize the fact that, under the laws of Louisiana, parties who have "signed and acknowledged the authentic act according to the forms of the laws of Louisiana, are, for all the purposes of

obtaining executory process, presumed to be before the judge," and the further fact that three days' previous notice must be given to the defendant in executory process, before any seizure and sale of his property can be lawfully made. And upon the facts of the case as disclosed in the record, they decided, as the three days' notice had not been given, when the writ of error was sued out, that the order for executory process had not become a final judgment, and therefore dismissed the writ of error.

In the case of Bien *vs.* Heath (6 Howard) executory process was sued out in the United States court of Louisiana, and the defendant, Bien, applied for and obtained an injunction to arrest the sale under it. Upon the trial had upon the injunction in the court in Louisiana, the injunction was dissolved so that the executory process would have its effect. From the decision dismissing the injunction, Mrs. Bien appealed, and the decree of the lower court was affirmed.

The case of Bien *vs.* Heath (11 Howard) was an action brought on the injunction bond given in the last mentioned case. In this case the injunction bond having been given in a chancery proceeding, and upon a condition different from that directed by the court in granting the injunction, (p. 177,) it was held that a recovery could not be had upon it for the penalty actually inserted in the bond, and the judgment of the lower court was therefore reversed, and *venire de novo* awarded. And it is obvious that this decision was clearly right. By the laws of Louisiana, any person may obtain an injunction *ex parte*, and the Legislature has therefore imposed very stringent conditions and penalties upon those obtaining injunctions wrongfully. But this is not the case in the courts of the United States sitting in Louisiana. By the act of Congress of 1793, ch. 22, sec. 5, the courts of the United States are prohibited from granting injunctions "in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." When an injunction is granted by a United States court, it is after both parties have been heard, and the responsibilities imposed on the plaintiff in injunction are of a very different description from those resulting from *ex parte* action.

When the three cases just spoken of are fully considered, it is not only apparent there is nothing whatever in the language of the Supreme Court, in relation to them, which in any manner sustains the position of the complainant that a proceeding by "executory process" is not a legal proceeding in the United States courts sitting in Louisiana; but that the decisions in these very cases do in fact recognize that mode of proceeding as a legal and proper proceeding in this court. But the recognition of the proceeding as a legal one under the laws governing the action of the courts of the United States in Louisiana most clearly results from the decision of the Supreme Court in the last of the four cases referred to, viz: that of Erwin *vs.* Lowrie, (7 Howard, 172.)

In that case the validity of a sale made under a proceeding by executory process in the circuit court of the United States sitting in Louisiana, begun on the 23d day of May, 1840, (p. 176,) was called in question in a suit instituted on the 16th day of August, 1846, against the purchase under that sale, in one of the district courts of the State of Louisiana. There was a judgment in the district court of the State against the validity of the sale. The purchaser appealed from that judgment, and the supreme court of the State of Louisiana affirmed the judgment of the lower court in the decision in the case of Lowrie *vs.* Erwin reported in 6 R. 192. From the supreme court of Louisiana, the case was carried before the Supreme Court of the United States under the 25th section of the Judiciary Act of 1789, upon the single ground that in that case there had been drawn in question the validity of an authority exercised under the United States, and that the decision was against validity. (1 U. S. Statutes at Large 85, sec. 25. Crowell *vs.* Randell, 10 Peters, 368.) When the Supreme Court of the United States took up the case, it was stated that Erwin had presented his writ of error "under the 25th section of the Judiciary Act of 1789, on the ground that there was drawn in question the validity of an authority exercised under the United States, and that the decision of the supreme court of Louisiana was against its validity," and the court then says: The whole proceeding, commencing with the

petition of Andrew Erwin, demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground; that is to say, *whether the* deed by the marshal to James Erwin *was void, for the reason that it was not supported by a lawful judgment*, or that, *for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. If void on any one ground, it would be altogether useless to reverse the judgment because an error had been committed on any other ground, &c.*"

The court then, after referring to the question whether property in the course of administration in the probate court, could be seized and sold by an execution founded on a proceeding in another court, and observing that they had declined to decide it in the case of Collier *vs.* Stanbrough, (reported in 6 Howard, 14,) and had ruled that cause on another ground, said: "*That a special mortgage, where no succession has occurred, may be foreclosed by this mode of proceeding—that is, by an order of seizure and sale in the circuit court of the United States held in Louisiana—we have no doubt,*" (p. 180,) and proceeded to decide: 1st. That the order for executory process was a judgment rendered by a court of competent jurisdiction—p. 181. (Elliott *vs.* Pearsall, 1 Peters, 340.) 2d. That after the order for the seizure and sale of the mortgaged property was given, it was necessary to give three days' notice to the debtor before the seizeure, &c., &c., as provided in article 735 of the Code of Practice, and *that this having been done,* the proceedings were legal and the sale under them was valid, and vested a good title to the property; and therefore reversed the judgment of the supreme court of the State of Louisiana. And now, it may be asked, is it not certain that the proceeding by executory process is a rightful proceeding in the circuit court of the United States in Louisiana?

The position of the plaintiff in error, as we understand it, is this, viz: That the provisions contained in the eleventh section of the judiciary act of 1789 require process by citation to appear

and answer, &c., to be served on parties defendant in all cases. If this were so, those provisions would not, in any manner, affect or influence the validity of the proceedings in the case before the court. The force and effect of the provisions contained in the judiciary act of 1789 were derived from the exercise of the legislative power vested in Congress. It was, and still is, the right of Congress to modify or repeal any of the provisions of that act by the subsequent exercise of its legislative powers. The act of 1824, by which "the laws directing the mode of practice in the district courts of Louisiana" were adopted and made operative in the courts of the United States, sitting in that State, in such a manner as to have the force and effect of the laws of the United States, owes its existence to an exercise of the same legislative power; and, if there was any inconsistency between the provisions of the laws of Louisiana thus adopted and the provisions contained in the eleventh section of the judiciary act, those provisions, under the operation of the act of 1824, would have had the effect of repealing the provisions of the eleventh section, so far as they were inconsistent with them, because the act of 1824 contained the latest expression of the legislative will.

But, in point of fact, there is nothing in the proceeding, by executory process, which is in any degree repugnant to the eleventh section of the judiciary act. That section was designed to regulate the jurisdiction of the courts of the United States over the inhabitants of the United States, and to so restrain it that no inhabitant of any State could be proceeded against in a United States court, in any original action, unless he was present in the district where the suit was brought. The language of the section is clear: "No civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This provision had not, and cannot have, any application in determining the mode by which a defendant is to be brought into court. That is to be determined by the process acts of the Congress of the United States, and by the State

laws adopted by them, and by the principles and usages of law. The object of the provision was to prevent any person not the inhabitant of a particular district from being affected by any judicial proceedings begun in it in his absence; and when the cases referred to by complainant's counsel are examined, it will at once be seen that they were cases in which proceedings had been instituted against non-residents, and that it was the fact of non-residence which constituted the barrier to the exercise of jurisdiction. (Chaffee *vs.* Hayward and Day *vs.* Hayward, 20 Howard, 208, &c.)

Whether a party is properly before a court of the United States, when he is rightfully subject to its jurisdiction, and is an inhabitant of the district in which it sits, is an entirely different question from that presented by the eleventh section of the judiciary act of 1789. It is true, as was said by the Supreme Court of the United States in the case of Hollingsworth *vs.* Barbour *et al.*, (4 Peters, p. 472,) that "by the general law of the land no court is authorized to render a judgment or decree against any one or his estate until after due service of process. This principle is dictated by natural justice; and *is only to be departed from in cases expressly warranted by law, and excepted out of the general* rule;" and as was said by the same court in the case of Kendall *vs.* The United States, (12 Peters, 623,) that "No court can, in the *ordinary administration of justice in common-law proceedings*, exercise jurisdiction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process;" and as was said by it in the case of Herndon *vs.* Ridgeway *et al.*, (17 Howard, 425,) the jurisdiction of the "court over parties is acquired only by service of process, or their voluntary appearance."

In the present instance the plaintiff in the proceedings by executory process is a citizen of the State of New York, and the mortgage debtor is a citizen of the State of Louisiana. The plaintiff then has a right to proceed in the circuit court of the United States against the defendant in the same manner that a citizen of the State of Louisiana would have the right to

proceed in a district court of the State of Louisiana; and these questions at once arise: First, what are his rights? and second, how are they to be enforced? To the first question the answer is very simple. His rights are determined and fixed by the laws of Louisiana, where the contract to be enforced was entered into. And now we would ask: Is not the answer to the second question just as simple, when it is remembered that the Congress of the United States, by the act of 1824, declared that "the mode of proceeding in civil causes in the courts of the United States, &c., shall be conformable to the laws directing the mode of practice in the district courts of the State?"

And, then, does it not necessarily follow, that proceeding by executory process was rightful, and that the defendants, the New Orleans, Opelousas, and Great Western Railroad Company, were voluntarily before the court, "in one of the cases expressly warranted by law, and excepted out of the general rule," by signing and executing the act of mortgage according to law, so that it constituted a confession of judgment in favor of the holders of the mortgage debt? The Supreme Court of the United States said that this was so in the case of Levy *vs.* Fitzpatrick (15 Peters, 170.) And is it not equally certain that the only service to be made upon the defendant, in such a proceeding, was actually made by the service of the notice to pay? That also necessarily follows from the language of the Supreme Court of the United States, in the case of Levy *vs.* Fitzpatrick (p. 172,) and in the case of Erwin *vs.* Lowrie, (p. 18, 7 Howard.)

II. The paraph of the notary public, before which a mortgage is executed by public act, is not necessary to authorize an order for executory process in favor of the holder of the notes or other obligations, the payment of which is secured by the mortgage contained in the act. If these notes, or other obligations, correspond in dates, amounts, and times of maturity, with those described in the act of mortgage, it is sufficient to support the executory process. Pepper *et al. vs.* Dunlap, 16 L., 163, 167; Jones *vs.* Elliott, 4 A., 303, 304. In the case of Babin *vs.* Winchester, (7 L., 468,) the court said: "As to the identification of the note sued on, with the mortgage, it is not

requisite that this circumstance, which is merely accidental to the contract, should be made appear by the usual paraph '*Ne Varietur*.' In the present case a comparison of the date of the note with the sale, and the circumstance appearing that it was executed precisely in pursuance of the terms and conditions of the sale, both as to persons and terms of payment, creates a violent presumption in favor of its identity with the mortgage, which must stand until the contrary is proven, which has not been done in the present instance."

In the case of Chambliss *vs.* Atchison, (2 A., 488,) cited by the plaintiff in error, the identity did not appear in the record. That case was one of an order of seizure and sale which was obtained on notes originally given by one Neibert to Job Bass, and which were alleged to have been assumed by Atchison, the defendant, with a new mortgage. An injunction was obtained against the order of seizure and sale, and among the other grounds for it, it was alleged that the identity of the notes was not shown inasmuch as they were not paraphed, and the mortgage of Neibert described those that were given *as drawn in favor of Bass, and Bass's name was not on the notes which the plaintiff had produced.* The court in deciding that case, said: "It may be true that the certificates and paraph of the notary upon mortgage notes are not indispensable to enable the holders to resort to executory process, but this identity must be apparent on record. It appears to us in this case to be matter *en pais.*" The notes there produced differed from those described in the mortgage act, in not containing the name of Bass in whose favor the mortgage act stated they had been made. If this had not been so the decision would have been different.

The other cases cited by the defendant (4 L., 320; 2 R., 303; 9 A., 310, &c.,) have no application whatever to this point. They only bear upon the point that when a mortgage is granted to secure the payment of a note in favor of a payee named in it, the transfer to a third person as the holder must be shown by authentic proof to entitle him to proceed by executory process. But the right of the holder of a note secured by mortgage to excercise the mortgage right is one thing, and the identity of a

note so secured with the act of mortgage is quite a different thing. In the present case the right of the holder of any coupon of interest to exercise the mortgage right, is shown by the act of mortgage itself, for the company in the act expressly declared that the mortgage granted was "to secure the full, faithful, and punctual payment, and the redemption of each and all of the said bonds" to any future holder or holders thereof, and to each and every one of them, together with the interest accruing thereon, in the manner and at the periods of time "stipulated, as evidenced by the coupons attached to the said bonds, respectively, payable on the first days of April and October of each year," "*and in favor of all* and every person and persons whomsoever, who become the holder or holders of said bonds or coupons, or any of them."

As to the assertion that the existence of any other indebtedness on the part of the company, to other persons than Charles Morgan, was not shown, it is sufficient to say, that the copy of the act of mortgage filed in the cause constituted authentic proof that the company had granted a mortgage on the first of April, 1859, to secure the payment of a capital sum of $2,000,000 on the first of April, 1889, and an interest thereon, at the rate of eight per cent. per annum, payable semi-annually, on the first days of April and of October in each year; that the copy of a portion of the annual report of the company of the 25th of January, 1869, certified by the president, and under the seal of the company, (p. 9 of Rec.,) constituted authentic evidence that the company, on the 25th of January, 1869, had then outstanding, 15,165 coupons of $40 each, representing the interest on that mortgage debt which had then accrued and remained unpaid, and amounting to the sum of $606,600; and that on the first of April, 1869, that amount was augmented by another half year's interest which had then accrued.

But whether it were or were not true that the amount of $686,600 was the exact amount of the interest on the mortgage debt of the company which was due on the first of April, 1869, could not in any manner affect the right of Mr Morgan to carry on the proceeding by executory process. The mort-

gage was a subsisting mortgage, inscribed in the records of the country according to law. The amount of interest then due upon it was apparently $686,600; it was the duty of the court, under the law, to require that such a portion of the price of the sale of the property as would cover the amount then due upon the mortgage should be payable in cash; and up to this time there has not been the slightest pretension ever set up by the plaintiff in error that the amount in question was not really due on the first of April, 1869.

III. There is no ground for the pretension which appears to be set up by the plaintiff in error that the other bondholders should have been made parties to the proceedings for the sale of the mortgaged property. It is sufficient to say that the laws of Louisiana regulating the enforcement of mortgage rights require nothing of the kind; and the other bondholders, in point of fact, in this case, have obtained all the advantage of the legal proceedings under which that sale was effected, and have escaped the burden and expense of instituting and carrying on those legal proceedings. After the sale, they applied for and received from the marshal their *pro rata* out of the proceeds of the sale, and have been in the actual enjoyment, for nearly two years, of all the fruits which it would have been possible for them to have derived from legal proceedings to which they might have been parties, whilst the prosecution of this writ of error against Mr. Morgan has been going on.

IV. After the service of the notice to pay, required to be given to a defendant in proceedings by executory process, ample means are afforded to him, by the laws regulating judicial proceedings in civil causes in the courts of the United States sitting in Louisiana, to obtain redress for any wrong done him by the prosecution of such a proceeding.

The one against whom "an order of seizure and sale shall have been rendered may obtain an injunction to suspend the sale, if, before the time of sale, he files in the court issuing the order his opposition in writing," (and without being required to

give any security,) on the allegation, upon oath, of any one of the following grounds:

That the act containing the privilege or mortgage is forged;

That it was obtained by fraud, violence, fear, or some other unlawful means;

That the debt has been remitted by the creditor;

That he has paid it;

That it has been extinguished by transaction, novation, or in some other legal manner;

That he has a liquidated account to plead in compensation to the debt claimed; or

That the action for the recovery of the debt is barred by prescription.

(C. of P., 738, 739, 740.)

And he has also the right to an injunction to stay the sale of the property proceeded against upon the allegation, upon oath, of the existence of any other legal ground for the interference of a court in a judicial proceeding, on giving security in an amount, fixed by the court, to indemnify the plaintiff in the executory process for any loss he might sustain.

(C. of P., 749, 750, 296, 303, 304.) R 146

The applications made by the plaintiff in error to the circuit court on the first of June and the eighteenth of June, 1869, (pp. 23, and 16, 17 and 18, of Rec.,) were unauthorized by any rule of proceeding in force in the circuit court of the United States sitting in the district of Louisiana; they were not based on allegations made upon oath; were not supported by any evidence; and were, therefore, properly disregarded and overruled.

It is true the plaintiff in error now states that the appearance in court on the first of June, 1869, &c., was for the purpose of asking "for an *audita querela*." (P. 5 of brief on file.) But nothing of the kind was said or thought of at the time; and a simple inspection of the proceedings will show that those applications were mere motions made in the cause, (No. 5788 of the circuit court,) and had nothing in them of the nature of a proceeding on an *audita querela* as known to the common law. An *audita querela*, at common law, is a regular suit. It is

begun by writ, like any other action. It is true it is to be brought in the court in which the original proceeding complained of was carried on; but it is, nevertheless, a distinct and separate suit, and is to be carried on as such in the same manner that actions of nullity with respect to judgments and to judicial sales are carried on in Louisiana under the provisions of the Code of Practice. (1 Comyn's Dig., 785. *Verbo Audita Querela.* 1 Bacon's Abridgment. *Verbo Audita Querela.* C. and P., 604, and following.) Tufts, Fermor & Co. *vs.* Beard, 9 A., 310.

A proceeding by *audita querela*, technically so called at common law, is unknown in the practice of the circuit court of the United States for Louisiana; but the remedy afforded by that proceeding, as carried on in common law courts, is afforded as amply and as completely in Louisiana, under the forms and modes of proceeding authorized by the laws in force there, as it can be by an *audita querela* in any other State.

Not only has the defendant in a proceeding by executory process the means of protecting himself by injunction against any wrong which may be done him by that process, but he can have any irregularities which may be committed in the granting of the process reviewed and corrected by carrying the proceedings before the appellate court. In the State courts of Louisiana, such a review is obtained by an appeal. In the circuit court of the United States, sitting in that State, it can be obtained by taking them to the Supreme Court by writ of error; and a writ of error, if sued out in ten days from the time of service of the notice to pay, will operate as a *supersedeas.* (Aubert *vs.* Robinson, 6 R., 463.)

The means for making a writ of error as effective as an appeal, are furnished, in the completest manner, by the provisions contained in the Code of Practice, 602, 603. In the present case the means furnished for that purpose have not been made use of by the plaintiff in error, and the record is not in a condition to enable the court to review the decision of the circuit court on the questions of law presented in the cause, for the reason mentioned by us before. But this is not all. If the present record